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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 253.

JOHN S. DONALD, SECRETARY OF STATE OF THE STATE OF WISCONSIN, AND WALTER C. OWEN, ATTORNEY GENERAL OF THE STATE OF WISCONSIN, APPELLANTS,

vs.

THE PHILADELPHIA & READING COAL & IRON COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED SEPTEMBER 26, 1914.

(24,380)

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INDEX.

	Original.	Print
Caption	1	1
Bill of complaint	4	2
Subpœna	24	12
Memorandum	25	13
Return on subpœna	26	13
Order to show cause	27	14
Motion for injunction	29	15
Appearance of defendants	31	16
Answer	33	17
Interlocutory injunction	45	25
Petition for and order allowing appeal	48	26
Assignment of errors	50	27
Bond on appeal	52	28
Præcipe for transcript of record	54	30
Clerk's certificate	55	30
Citation and service	56	31

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 11, 1915.

1 United States District Court, Western District of Wisconsin.

1-E, Civil Docket.

THE PHILADELPHIA & READING COAL & IRON COMPANY,
Complainant,
vs.
J. S. DONALD, Secretary of State of the State of Wisconsin, and WALTER C. OWEN, Attorney General of the State of Wisconsin,
Defendants.

Luse, Powell & Luse, Superior, Wisconsin, and M. H. Boutelle, 701 New York Life Building, Minneapolis, Minn., solicitors and of counsel for complainant.

Walter C. Owen, Attorney General of the State of Wisconsin, and J. E. Messerschmidt, Assistant Attorney General, Madison, Wisconsin, solicitors and counsel for defendants.

2 District Court of the United States for the Western District of Wisconsin.

At the term of the District Court of the United States of America for the Western District of Wisconsin begun and held at the city of Madison in said district on the 5th day of March, A. D. 1913, present and presiding the Honorable Arthur L. Sanborn, Judge, among other, the following proceedings were had, to-wit:

3 District Court of the United States for the Western District of Wisconsin.

THE PHILADELPHIA & READING COAL & IRON COMPANY,
Complainant,
vs.
J. S. DONALD, Secretary of State of the State of Wisconsin, and WALTER C. OWEN, Attorney General of the State of Wisconsin,
Defendant.

Be it remembered that heretofore, to-wit, on the 5th day of March, 1913, came the Philadelphia & Reading Coal and Iron Company, by Messrs. Luse, Powell & Luse, and M. H. Boutelle, its solicitors, and filed in the office of the Clerk of the District Court of the United States for the Western District of Wisconsin its bill of complaint in words and figures following, to-wit:

4 United States District Court in and for the Western District of Wisconsin.

THE PHILADELPHIA & READING COAL & IRON COMPANY,
Complainant,
vs.
J. S. DONALD, Secretary of State of the State of Wisconsin and WALTER C. OWEN, Attorney General of the State of Wisconsin,
Defendants.

To the Honorable the Judges of the United States District Court in and for the Western District of the State of Wisconsin:

Your orator, The Philadelphia & Reading Coal & Iron Company, brings this, its Bill, against the above named defendants, J. S. Donald, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin, and thereupon, your orator complains and alleges as follows:

1st. That at all times hereinafter mentioned, your orator was and at the commencement hereof is, a corporation duly created organized and existing under and by virtue of the laws of the State of
5 Pennsylvania, and was, during all the times herein mentioned and at the commencement hereof, is, a citizen of said last named State. That each of the above named defendants were, at the several times hereinafter mentioned and at the commencement hereof, are, respectively, citizens of the State of Wisconsin and residents of the Western Federal District of said last named State. That the amount herein in controversy, exclusive of interest and costs, exceeds the sum and value of Three thousand (3,000.) dollars.

2nd. Futher complaining, your orator alleges and avers that at all times herein mentioned, your orator has been and still is engaged in the general business of the mining, producing and sale of various coal products, and has been and still is engaged in the handling, sale and disposal of said products in commerce between the several states of the United States and with foreign countries. That the mines of your orator are, and were at all times herein mentioned, located in the State of Pennsylvania and that the product of said mines has been, during the times herein stated and still is, marketed and sold by your orator throughout a large area or portion of the United States and Canada, and has been, and is, shipped by your orator from its said mines, for sale, and sold by it in various of the States of the United States and Canada. That the territory covered by the business herein alleged, has, for many years prior to the commencement hereof embraced, and at the commencement hereof embraces, the so-called Northwestern States of the United States, including the State of Wisconsin;

3rd. That during all the times herein mentioned, and at the commencement hereof, a considerable portion of the coal product mined by the various producing or mining companies in the State of Pennsylvania, including your orator, and intended for
6 sale and distribution throughout various of the Western States of the United States and Western Canada, has been

and still is, shipped and transported by way of the Great Lakes, to various of the Western ports on said Lakes, including ports in the State of Wisconsin, and there accumulated and stored for transhipment by rail to the various points of destination in such Western States and Canada in which said product is sold;

4th. That during all the several times herein mentioned, your orator has owned and maintained, and still owns and maintains at several of said Great Lakes ports within the State of Wisconsin, extensive docks with various plant equipment and appliances for the handling, storage, transhipment and distribution of its coal products intended for sale and sold throughout the territory hereinabove mentioned, including the State of Wisconsin and that during the times herein mentioned, your orator has handled, stored and transhipped from said docks, many hundreds of thousands of tons of various kinds and qualities of coal sold throughout said territory;

5th. That during all the times herein mentioned, your orator has been engaged, as aforesaid, in interstate and foreign commerce and has had and maintained in the State of Wisconsin and still has and maintains in said State, various docks, properties and facilities for the handling and conduct of such commerce and that during all said times, your orator has sold and disposed of a relatively small part or portion of its entire coal tonnage, handled, as aforesaid, through its docks and other facilities in the State of Wisconsin, to various patrons and customers within the State of Wisconsin and that at the commencement hereof, it is still engaged in the general business herein and in this paragraph mentioned;

6th. That during the times herein mentioned, your orator has laid out and invested in the State of Wisconsin, many hun-
7 dreds of thousands of dollars in the acquisition and improvement of its various dock and other properties used and employed in the carrying on and conduct of the business aforesaid and in the installation of plants, machinery and appliances employed on said docks and used in connection therewith for the handling, storage and shipment of its said product and that your orator is, at the commencement hereof, the owner thereof. That during all the times herein mentioned, the said several properties owned by your orator within the State of Wisconsin, have been regularly taxed by said State and that your orator has paid to said State, the taxes thereon levied and imposed. That your orator has built up and established during the times herein mentioned and at the date of the commencement hereof has and maintains, a permanent and established business within this State as hereinbefore and in this Bill alleged, which said business has been and is, of great value to your orator and any interference with the conduct whereof in this State will inflict upon your orator, great and irreparable loss and damage;

7th. That heretofore and on or about the 1st day of September, 1898, the legislature of said State of Wisconsin caused to be regularly enacted in matter of form, a law of said State wherein and whereby it was amongst other things provided, that no corporation organized otherwise than under the laws of said State of Wisconsin, should transact business or acquire, hold or dispose of property

therein, until such corporation should have caused to be filed in the office of the Secretary of State of Wisconsin, a duly authenticated copy of its Charter, Articles of Association or incorporation and should pay to the Secretary of State of said State, a fee of twenty-five (25) dollars. That by the terms of said enactment it was further provided that any such corporation, by filing its Charter or Articles, as aforesaid, should be held to have constituted and appointed the Secretary of State of said State of Wisconsin, its true and lawful attorney upon whom process might be served in
8 any action or proceeding against such corporation in respect to any liability arising out of any business, contract or transaction in said State. That it was further provided by said enactment that failure of compliance with the terms thereof by any such foreign corporation doing business in said State, should subject its officers, agents, or representatives acting for it in said State, to various penalties therein and thereby enumerated and in addition to such enumerated penalties, that every contract made by any such corporation thus failing to comply, relating to property within the State or affecting the personal liability of such corporation, should be null and void on its behalf and on behalf of its assigns, but that such contract should be enforceable against such corporation or its assigns;

8th. That as your orator is informed and believes, said enactment of the legislature of the State of Wisconsin last hereinbefore mentioned, was the only enactment of the legislature of said State adopted or enacted up to the time last indicated, application to foreign corporations engaged in general trade or commercial pursuits and that said enactment was the only act of the legislature of said State applicable, or which could be claimed to be applicable to your orator and prescribing the terms of doing business in said State at the time of its qualification and license to carry on and conduct its business with this State as next hereinafter alleged. That your orator duly and regularly complied with the terms of said enactment and subsequent to the date of the adoption thereof and prior to the 10th day of November, 1898, your orator duly caused a duly authenticated copy of its Charter to be filed with the Secretary of State of said State and the therein and thereby prescribed filing fee to be paid to said State. That on or about the 10th day of November, 1898, the Secretary of State of
9 the State of Wisconsin, caused to be issued to your orator, a license to do business within said State.

9th. That your orator has already and previously to the enactment of the legislation last hereinbefore mentioned, been engaged in carrying on and conducting business of the general character hereinbefore alleged in the State of Wisconsin. That as your orator is informed and believes, no legislation of said last named State previous to that hereinbefore alleged, had imposed any restrictions or conditions whatsoever upon the carrying on or conduct of business by foreign commercial or trading corporations within the limits of said State. That by reason of the character of the business in which your orator was engaged in the State of Wisconsin

as hereinbefore alleged, your orator at the time of the adoption of the legislation by said State above mentioned, was in doubt whether the same could be lawfully construed as applicable to foreign corporations engaged in the line of business carried on and conducted by your orator as aforesaid. But, that notwithstanding the doubt entertained by your orator of the application of said legislation to your orator or to its right to carry on and conduct the business aforesaid, your orator voluntarily complied with the terms of said enactment as hereinbefore stated. That since the date of compliance by your orator with said enactment and the issuance to your orator as aforesaid, of the license of said State, your orator has been continuously engaged in the carrying on and conduct of the general business as hereinbefore alleged, in said State, and is engaged in the carrying on and conduct thereof at the commencement hereof. That prior to the wrongful and unlawful acts hereinafter and in this Bill alleged, no question has ever been made by the State of Wisconsin, or any authorized representative in its behalf, of the right of your orator to continue in the carrying on and conduct of its business in said State and that no act
10 or proceeding prior to the matters hereinafter alleged, has ever in anywise been had upon the part of said State or any representative thereof in its behalf to in any wise interfere with, qualify or revoke the license issued to your orator as hereinbefore alleged;

10th. That subsequent to the enactment by the legislature of the act hereinbefore referred to and after your orator had complied, as aforesaid, with the terms of that act and had been licensed to do business in said State in accordance with the provisions thereof and while your orator was still engaged in the conduct of its business, as hereinbefore alleged, in said State, the legislature thereof duly and regularly enacted in matter of form, several supplementary or amendatory laws to that hereinbefore mentioned. That by Chapter 506 of the General Laws of Wisconsin for the year 1905, it was provided in substance that no corporation incorporated or organized otherwise than under the laws of Wisconsin, except railroad corporations, corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, should transact business or acquire, hold or dispose of property in the State of Wisconsin until such corporation should have caused to be filed in the Office of the Secretary of State, a copy of its Charter, Articles of Association or incorporation and all Amendments thereto, duly certified by the Secretary of State of the State wherein the corporation was organized. That it was further provided that such corporation should file with the Secretary of State of said State, together with its Articles of Incorporation or Association, as aforesaid; a sworn statement stating amongst other things, the name of the corporation, the lo-
11 cation of its principal office or place of business without the State of Wisconsin and in case said corporation was to have

a place of business or principal office within the State, the location thereof; the names and addresses of the officers of said corporation and the name and address of the Agent or Manager of said corporation who should represent the same in Wisconsin; the amount of the Capital Stock paid in, in money, property or services; the nature of the business to be transacted in Wisconsin; the proportion of the Capital Stock of said corporation represented in the State of Wisconsin by its property located or to be acquired therein and by its business to be transacted therein, appointing the Secretary of State of Wisconsin its true and lawful attorney for the Service of Process in any actions or proceedings against it in respect to any liability arising out of any business, contract or transaction in Wisconsin; the date when such corporation was authorized to do business in the State wherein incorporated and whether now so authorized; and that such corporation as a condition of its being permitted to begin or continue doing business within Wisconsin, should comply with all the laws of the State with regard to foreign corporations;

That in addition to the matters hereinbefore alleged, it was further provided and enacted by said Act that said corporation should pay to the State of Wisconsin, a certain filing fee and in addition thereto, a license fee as therein provided; and that it was further provided by the same enactment that the license of such corporation to do business in Wisconsin should be revoked if it should remove or make application to remove into any District or Circuit Court of the United States, any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within the State of Wisconsin;

11th. That it was further provided and enacted by the law last hereinbefore mentioned, that every foreign corporation which had theretofore filed with the Secretary of State of said State, a
12 copy of its charter or articles of association or which should thereafter file the same as required by said Act and every foreign corporation transacting business in the State of Wisconsin, should annually, during the month of January, file with the Secretary of State, a report, sworn to by the president, secretary, treasurer or general manager of the corporation as of the 1st day of January, which report was, by the terms of said enactment, required to state amongst other things, the following: The name of such corporation and the location of its principal office or place of business without this State and its place of business or principal office within this State, if maintained; the names and addresses of the officers of said corporation and the name and address of the agent or manager who may represent said corporation in this State; the nature of the business transacted in the State during the year preceding; the amount of capital stock paid in, in money, property or services; the total amount of business transacted by said corporation during the preceding year and the true value of all property held by said corporation; the total amount of business transacted during the preceding year; the proportion of the capital stock represented in the State of Wisconsin by its property located and

business transacted therein during the preceding year and in case said report showed that said corporation had increased the proportion of its capital stock employed in Wisconsin, that said corporation should pay to the Secretary of State at the time of filing said report, an additional fee of one (1) dollar for each one thousand (1,000) dollars of its capital in excess of twenty-five
13 thousand (25,000) dollars or in excess of the proportion of the capital stock already paid for by said corporation; and that such corporation, as a condition to its being permitted to begin or continue doing business within the State of Wisconsin, should comply with all the laws of the State with regard to foreign corporations and in case of failure to file said report or if said corporation should remove or make application to remove into any District or Circuit Court of the United States, any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within that State, the license issued to said corporation should be void and the Secretary of State of said State should enter such forfeit in the records in the Department of State of said State;

12th. That the enactment last hereinbefore mentioned was entitled:

"An Act to amend Sec. 1770*b* of the Statutes of 1898 as amended by Sec. 27, Ch. 351 of the laws of 1899, Sec. 1, Ch. 399, Laws of 1901, and Sec. 1, Ch. 434, Laws of 1901 and creating four new sections to the Statutes of 1898 to be known as 1770*f*, 1770*g*, 1770*h* and 1770*i*, relating to Foreign Corporations."

That the same was approved June 20th, 1905, published July 1st, 1905 and by its terms went into force and effect on and after the 1st day of October, 1905. That as your orator is informed and believes, said statute has never been in any wise amended, modified or repealed by any subsequent legislation enacted by said State;

13th. That none of the aforesaid legislation of the said State of Wisconsin, effected or imposed any requirements whatsoever upon domestic corporations organized under the laws of that
14 State and that all of said legislation and the provisions and requirements thereof, were exclusively directed at, and exclusively affected foreign corporations organized under the laws of other States than that of the State of Wisconsin. That by reason of the facts in this paragraph alleged, requirements and exactions were made by the terms of said law on foreign corporations engaged in business in the said State of Wisconsin which were not made upon, and in no wise applied to or affected, domestic, or corporations organized under the laws of the State of Wisconsin, notwithstanding both classes of such corporations were of similar character, exercising similar corporate franchises and engaged in the same lines of business within said State;

14th. That heretofore and on or about the 3rd day of August, 1912, a certain civil action was instituted by one, Ole Huen, a citizen of the State of Wisconsin, as plaintiff, against your orator, as defendant, to recover against your orator, damages for personal

injuries claimed to have been sustained by plaintiff while in the employment and service of your orator within the State of Wisconsin. That said action was instituted by said plaintiff in the Superior Court of Douglas County, Wisconsin, a court of general civil jurisdiction in said last named State and that process therein was at, or about the date last hereinbefore mentioned, served on your orator. That thereafter and on or about the 21st day of August, 1912, your orator in all respects in accordance with the Acts of Congress in such case made and provided, duly caused to be presented to the said Superior Court of Douglas County, Wisconsin, its petition for removal of said action into the United
15 States District Court in and for the Western District of the State of Wisconsin, and that thereafter such proceedings were duly had on the petition of your orator that an order was made and entered by said Superior Court granting said petition and removing said cause into the United States Court, aforesaid. That said cause is still pending and undetermined in said last named court;

15th. That upon and subsequent to the proceedings last hereinbefore mentioned and the removal by your orator of said action as last hereinbefore alleged, and prior to the commencement hereof, a petition in writing was presented by the attorney of the plaintiff in said action to, and filed with, the Secretary of State of the State of Wisconsin, reciting the fact of the removal by your orator of said cause, as aforesaid; asserting that such removal was had in violation of the laws of the State of Wisconsin hereinbefore and in this bill enumerated and praying that the said Secretary of State should forfeit and annul the license of your orator to do business within this State, solely by reason of facts in said petition and hereinbefore alleged, that your orator had removed said cause into the United States District Court as hereinbefore stated;

16th. That at the commencement hereof the above named defendant J. S. Donald is the duly elected, acting and qualified Secretary of State of the State of Wisconsin, and the above named defendant Walter C. Owen is the Attorney General of said State.

17th. That unless restrained and enjoined by law, the said defendants, as your orator is informed and believes, will, in the manner provided by said laws, as hereinbefore alleged, an-
16 nul and revoke the license of your orator to do business within the State of Wisconsin and will otherwise harrass and annoy your orator by further proceedings to the great and irreparable damage to its established business within said State and its property therein and that your orator will be thereby wrongfully deprived of its property and business. That in the event of such forfeiture or revocation of your orator's license to do business in said State, all contracts made by your orator in said State while such forfeiture remains in force and effect and until the same is annulled by judicial authority, will be null and void as provided by the laws aforesaid and that your orator will be denied recourse to the courts of the State for the enforcement of its ordinary contract rights arising in the course of the transaction of its ordinary

business in said State and that your orator will be harassed and annoyed in various ways by the promulgation of such an order and that its business in said State, by the public announcement of the forfeiture of its franchise to do business therein, will be seriously and irreparably injured and damaged;

18th. That in addition to the matters last hereinabove alleged, your orator would be subject, as provided by the laws aforesaid, to proceedings at the hands of said State for the recovery of the penalties therein and thereby prescribed upon foreign corporations doing business within said State without compliance, or in violation of said laws;

19th. That as your orator is informed and believes and therefore so alleges the fact, each and all said several enactments and laws of the State of Wisconsin hereinbefore and in this bill alleged, are contrary to the Constitution of the United States and
17 the laws of Congress enacted in pursuance thereof, in this, to-wit: (1) That said laws and each thereof constitute and operate as a restriction upon and direct interference with, or regulation of, the right and privilege of conducting and carrying on interstate commerce within the State of Wisconsin in violation of, and contrary to, the provisions of section eight of article one of the Constitution of the United States. (2) That by virtue of the conditions imposed by the original enactment of the legislature of the State of Wisconsin in 1898, and the implied invitation, contained in said enactment, to foreign corporations to enter the State of Wisconsin under the terms and conditions thereby prescribed and the acceptance of said terms by your orator, a contract relation resulted and that the subsequent legislation of said State hereinbefore referred to, impairs the obligation of said contract, contrary to the terms of section ten of article one of the Constitution of the United States. (3) That said statutes are further contrary to the Constitution of the United States, illegal and void in that it is therein and thereby provided that as a condition precedent to the right of a foreign corporation to enter the State of Wisconsin and transact business therein, or to continue to carry on and conduct its business in said State if already located therein, such corporations must affirmatively stipulate and agree to surrender the right and privilege secured by the Constitution of the United States and the laws of Congress enacted in pursuance thereof, of removing actions or proceedings otherwise rightfully and lawfully removable under said Federal Constitution and laws, to the courts of the United States and visiting upon any such corporation exer-
18 cising such right of removal, the penalty of being forbidden to do business within the State, or, if already doing business therein, of having its authority and license for the transaction of such business, cancelled and revoked. (4) That said several enactments hereinbefore alleged are further contrary to the Constitution and laws of the United States in so far as the same undertake or purport to deny the right of exercise of a right or privilege arising under, and created by, the said Constitution of the United States and laws of Congress enacted in pursuance thereof, in so far

as they undertake or purport to deny to your orator, and other corporations similarly situated, the right of removal of an action or proceeding otherwise lawfully removable, from a court of said State to the United States Courts, thereby contravening that provision, article six of the Federal Constitution providing and ordaining that the same, and the laws of Congress enacted in pursuance thereof, shall be the supreme law of the land, and the provisions of section two, article three, providing and ordaining that the judicial power of the United States shall extend to all cases of controversies between citizens of different states. (5) That said laws are further unconstitutional in that the same undertake to prescribe and visit restrictions upon the exercise of rights arising under the provisions last above mentioned of the Federal Constitution and laws and to visit penalties upon the exercise of such rights in accordance with the provisions of the Federal Constitution. (6) That said laws are further contrary to the Constitution of the United States and impair the rights of your orator, in this, to-wit: That by virtue of the provisions of the original law of the said State of Wisconsin of 1898, hereinbefore mentioned and the accept-
19 ance of, and compliance with the provisions thereof by your orator, and its entrance into said State of Wisconsin thereunder, your orator became and at all times thereafter continued to be, a person within the jurisdiction of the State of Wisconsin. That the subsequent legislation of said State hereinbefore enumerated, denying to your orator and other foreign corporations similarly situated, the right of removal of an action or proceeding instituted in the courts of said State into the United States Courts in accordance with the Constitution and laws of the United States, was, as hereinbefore stated, exclusively confined to foreign corporations and in no wise related to, or affected the rights of domestic corporations in the exercise of the right or privilege of removing causes or proceedings from the State to the Federal Courts, by, and as a result whereof, said legislation operates as a discrimination against such foreign corporations and as a denial of the equal protection of the laws of the State to all persons within its jurisdiction contrary to the provisions of section one of the Fourteenth Amendment of the Constitution of the United States. (7) That said legislation further contravenes that provision of section one of the Fourteenth Amendment to the Constitution of the United States providing that no state shall deprive any person of life, liberty or property without due process of law;

20th. That the above named defendants and each of them, are proceeding in purported compliance with and upon the authority assumed to be in them, and each of them, respectively vested under and by virtue of the illegal and unconstitutional enactments of the legislature of the State of Wisconsin herein and in this
20 bill mentioned and not otherwise. That the proposed action of the defendants, and each of them, in respect to the revocation and forfeiture of the license and privilege of your orator to do business within the said State of Wisconsin, is based exclusively upon said illegal and unconstitutional enactments and upon the

claim as hereinbefore alleged, that your orator has violated the provisions of said laws by the removal of the action hereinbefore alleged, from the courts of the said State of Wisconsin, into the United States Court. That no other claim of violation of the laws of the State of Wisconsin has ever been made against your orator and that the proposed action of said defendants proceeds exclusively upon the claim of violation of the statutes of the said State of Wisconsin in the respects herein and in this paragraph mentioned and not otherwise.

Wherefore, And for as much as your orator is remediless at and by the rules of common law, and can only have and obtain adequate remedy and redress in equity, and to the end that the defendants, and each of them, may appear and make answer unto the allegations of the foregoing bill as though specially interrogated on each thereof, but not under oath, answer under oath being hereby expressly waived, and that your orator may be adjudged entitled to an order of temporary injunction issuing out of this court, restraining and enjoining the defendants, and each of them, their respective assistants, agents, servants and employes during the pendency of this suit and until the further order of this court, from taking any acts or proceedings upon and by virtue of the matters herein and in this bill alleged, to revoke, annul or in any wise interfere with the license, right and privilege of your orator to carry on and conduct its business within the State of Wisconsin and that it may be further adjudged and decreed that your orator
21 is entitled to a permanent injunction issuing out of this court, restraining and enjoining the defendants, and each of them, their respective assistants, servants, agents and employes from taking any steps or proceedings to annul or revoke the license, right or privilege of your orator to carry on and conduct its business within the State of Wisconsin by virtue of the matters herein alleged and that it may be adjudged and decreed that each and all of the several laws of the State of Wisconsin hereinbefore and in this bill alleged, are contrary to the Constitution of the United States and the laws of Congress enacted in pursuance thereof and that your orator may have such other and further relief as is consistent with equity and the facts herein alleged;

May it please your Honors to grant unto your orator a writ of subpoena to be directed to each of the said defendants, J. S. Donald and Walter C. Owen, thereby commanding them, and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and then and there, full, true, direct and perfect answer to make to all and singular the allegations of the foregoing bill, and further, to stand to perform and abide such further orders, directions and decrees herein as to this Honorable Court shall seem meet.

M. H. BOUTELLE,
Minneapolis, Minn.;
LUSE, POWELL & LUSE,
Superior, Wis.,
Solicitors and of Counsel for Complainant.

22 STATE OF WISCONSIN,
County of Dane:

M. H. Boutelle, being first duly sworn deposes and says that he is one of the solicitors of the complainant in the above entitled suit. That this affiant is now, and for upwards of ten years last past, has been, the general Northwestern attorney for said complainant and as such, affiant has been and is, familiar with, and cognizant of, the various matters and facts alleged and stated in said bill. That in so far as the allegations of said bill refer to matters of record in the Department of State or the office of the Secretary of State of the State of Wisconsin, the knowledge of this affiant is based upon records and data furnished affiant at his request from the office of said Secretary of State and now in affiant's possession. That affiant has read the foregoing and attached bill and knows the contents thereof and that the same is true except as to matters therein stated and alleged on information and belief, as to which last named matters, affiant believes it to be true. That none of the officers of complainant reside in, or are within the State of Wisconsin at the time this verification is made. That at the date of this verification, there are no agents of the complainant within the State of Wisconsin having cognizance of the matters in the foregoing and annexed bill alleged.

M. H. BOUTELLE.

Subscribed and sworn to before me this fifth day of March, 1913.
FRED W. FRENCH.
[L. S.] *U. S. Commissioner Western District Wisconsin.*

23 Endorsed: No. 1-E Civil Docket. (Original) United States District Court in and for the Western District of Wisconsin. The Philadelphia & Reading Coal & Iron Company, complainant, vs. J. S. Donald, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin, defendants. Bill in Equity. Filed Mar. 5, 1913. F. W. Oakley, Clerk. Luse, Powell & Luse, Superior, Wisconsin, and M. H. Boutelle, 701-5 New York Life Bldg., Minneapolis, Minnesota, solicitors and of counsel for complainant.

24 Whereupon on same day, to-wit, March 5, 1913, subpœna issued, as follows:

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

The President of the United States of America to J. S. Donald, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin, Greeting:

We command you and every of you, That you be and appear before our Judges of our District Court of the United States of America, for the Western District of Wisconsin, at Madison, in said District on or before the twentieth day after service of this writ, ex-

clusive of the day of service, to answer or otherwise defend against a certain bill in equity this day filed by The Philadelphia & Reading Coal & Iron Company, in the Clerk's office of said Court, in said City of Madison, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the Western District of Wisconsin to Execute.

Witness, the Honorable Arthur L. Sanborn, Judge of the District Court of the United States of America, for the Western District of Wisconsin, at Madison, aforesaid, this 5th day of March in the year of our Lord one thousand nine hundred and thirteen and of our Independence the 137th year.

F. W. OAKLEY, *Clerk.* [L. S.]

Luse, Powell & Luse, Superior, Wis.
M. H. Boutelle, 701-5 New York Life Bldg. Minneapolis, Minn.
Solicitors and of Counsel for Complainant.

25 Memorandum.—The defendants are required to file their answer or other defense in the Clerk's office at Madison, Wis., on or before the twentieth day after service hereof upon them excluding the day of service; otherwise the said bill may be taken pro confesso.

[L. S.] F. W. OAKLEY, *Clerk.*

26 Afterwards said subpoena was returned served as follows:

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I hereby certify and return that on this 6th day of March, 1913, at Madison, in Dane County, Western District of Wisconsin, I served this chancery subpœna on the within named John S. Donald and Walter C. Owen, Secretary of State and Attorney General, respectively, of the State of Wisconsin, by showing this chancery subpœna to each of them personally and by delivering to and leaving with each of them personally a true copy thereof.

R. J. FLINT,
U. S. Marshal,
By CARL P. McASSEY,
Chief Office Deputy.

Endorsed: Original. No. 1-E Civil Docket. District Court of the United States, Western District of Wisconsin. The Philadelphia & Reading Coal & Iron Company vs. J. S. Donald, Secretary of State of the State of Wisconsin and Walter C. Owen, Attorney General of the State of Wisconsin. Chancery subpœna. Filed Mar. 7, 1913. F. W. Oakley, Clerk. Luse, Powell & Luse, Superior, Wis. M. H. Boutelle, Minneapolis, Minn., complainant's solicitors.

27 Afterwards, to-wit, March 7, 1913, filed order to show cause and motion, as follows:

United States District Court in and for the Western District of Wisconsin.

THE PHILADELPHIA & READING COAL AND IRON COMPANY,
Complainant,
vs.
J. S. DONALD, Secretary of State of the State of Wisconsin, and WALTER C. OWEN, Attorney General of the State of Wisconsin,
Defendants.

Upon presentation of the Verified Complaint in this cause and on motion of Complainant's Solicitors, praying that a Writ of Injunction may issue against the above named defendants, and each of them, their respective agents, assistants, and employees, pending the hearing of this suit and until further Order of the Court and on motion of Complainant's solicitors:

It is hereby Ordered, That said motion be heard before the Court at Madison, Wisconsin, on the 31st day of March, 1913, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

It is further Ordered, That the defendants, and each of them, be and appear before the Court at the time and place last hereinabove mentioned and then and there show cause, if any there be,
28 why the foregoing motion should not be granted and why a writ of Injunction should not be issued against said defendants, and each of them, their agents, assistants and employees, pending this suit, in conformity with the prayer of Complainant's bill.

It is further Ordered, That, pending the hearing of this motion, the above named defendants, and each of them, their respective agents, assistants and employees, be, and they are hereby restrained from taking any steps or proceedings in anywise interfering with the Complainant's license, right or privilege of doing business within the State of Wisconsin by reason of any matters stated and alleged in Complainant's bill.

It is further Ordered, That this Order be served upon each of the above named defendants on or before the 6th day of March, 1913, by delivering to them, and each of them, a copy hereof and that the attached motion and copy of the Verified Bill be served on the defendants, and each of them, together with this order.

Dated March 5, 1913.

By the Court:

A. L. SANBORN, *Judge.*

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I hereby certify and return that on this 6th day of March, 1913, at Madison, in Dane County, Western District of Wisconsin, I served this order to show cause on the within named J. S. Donald, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin, by showing this order

to each of them personally, and by delivering to and leaving with each of them a true copy thereof.

I further certify and return that at the same time and place I delivered to the said John S. Donald and Walter C. Owen,
29 Secretary of State and Attorney General, respectively, of the said State of Wisconsin, to each of them personally, a true copy of the Verified Bill herein mentioned as herein directed.

R. J. FLINT,
U. S. Marshal,
By CARL P. McASSEY,
Chief Office Deputy.

United States District Court in and for the Western District of Wisconsin.

THE PHILADELPHIA & READING COAL AND IRON COMPANY,
Complainant,
vs.
J. S. DONALD, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin,
Defendants.

Now comes the Complainant in the above entitled suit, The Philadelphia & Reading Coal & Iron Company, by its solicitors and moves this Honorable Court to grant a writ of Injunction against said defendants, and each of them, their agents, assistants and employees, pending this suit and until the further order of the Court, as prayed in the Bill of Complaint in this case. And complainant further moves the Court for the issuance of an order to show cause,
30 commanding the defendants, and each of them, to be and appear before the Court at a time and place to be fixed in said order and then and there show cause, if any there be, why a temporary injunction should not be granted herein and that pending the hearing of said motion, that the defendants and each of them, their agents, assistants and employees may be restrained in respect to the acts herein sought to be enjoined.

M. H. BOUTELLE,
Minneapolis, Minn.,
LUSE, POWELL & LUSE,
Superior, Wis.,
Solicitors and of Counsel for Complainant.

Endorsed: Original. No. 1 civil Docket E. United States District Court in and for the Western District of Wisconsin. The Philadelphia & Reading Coal & Iron Company, complainant, vs. J. S. Donald, secretary of state of the State of Wisconsin, and Walter C. Owen, attorney general of the State of Wisconsin, defendants. Order to show cause and motion. Filed Mar. 7, 1913. F. W. Oakley, clerk. Luse, Powell & Luse, Superior, Wisconsin, and M. H. Boutelle, 701-5 New York Life Bldg., Minneapolis, Minnesota, solicitors and of counsel for complainant.

31 Afterwards, to-wit, March 24, 1913, filed notice of appearance of defendants, as follows:

United States District Court in and for the Western District of Wisconsin.

THE PHILADELPHIA & READING COAL & IRON COMPANY,
Complainant,

v.

J. S. DONALD, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin,
Defendants.

To the Clerk of the United States District Court in and for the Western District of Wisconsin.

Please enter the appearance of J. S. Donald in his capacity as Secretary of State of the State of Wisconsin and of Walter C. Owen in his capacity as Attorney General of the State of Wisconsin, the defendants in the above cause, and that of ourselves as solicitors, as of the date of the filing hereof.

WALTER C. OWEN,
Attorney General of the State of Wisconsin.

32 J. E. MESSERSCHMIDT,
Assistant Attorney General of the State of Wisconsin, Solicitors for the Defendants.

Endorsed: 1-E. Civil Docket. United States District Court in and for the Western District of Wisconsin. The Philadelphia & Reading Coal & Iron Company, complainant, v. J. S. Donald, Sec'y of State of the State of Wisconsin, and Walter C. Owen, Att'y General of the State of Wisconsin, defendants. Notice of appearance of defendants. Filed Mar. 24, 1913. F. W. Oakley, clerk.

Afterwards, to-wit, March 26, 1913, filed answer of defendants, as follows:

33 United States District Court in and for the Western District of Wisconsin.

In Equity.

THE PHILADELPHIA & READING COAL & IRON COMPANY, Complainant,

vs.

J. S. DONALD, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin, Defendants.

The Answer of J. S. Donald, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin, Defendants, to the Bill of Complaint of the Philadelphia & Reading Coal & Iron Company, Complainant.

These defendants reserving to themselves all right of exception to the said bill of complaint for answer thereto or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto *for* answering, say:

I.

Admit that at all times mentioned in the said bill of complaint the said plaintiff was and is a corporation duly created, organized and existing under and by virtue of the laws of the state of Pennsylvania, and that during all the said times it was a citizen of said last named state; that each of the above named defendants were
34 at the several times therein mentioned, and at the commencement of this action were, respectively, citizens of the state of Wisconsin and residents of the Western Federal District of said state, and that the amount in controversy in this suit, exclusive of interest and costs, exceeds the sum and value of Three Thousand ($3,000) Dollars.

II.

Defendants have insufficient information to enable them to admit or deny that at all the times mentioned in said bill of complaint the said plaintiff has been, and still is, engaged in the general business of mining, producing and sale of various coal products, and has been, and still is, engaged in the handling and sale of said products in commerce between the several states of the United States and foreign countries or where their mines are located, or the manner of disposing of their product or the places where the same is marketed or sold or what the territory covered by the business of the said complainant embraced during the times in said bill of complaint alleged, or whether it includes the state of Wisconsin as in the said bill of complaint alleged.

III.

Defendants have insufficient information to enable them to admit or deny the allegations in the bill of complaint that a considerable portion of the coal product mined by the various producing and mining companies in the state of Pennsylvania, including the complainant, has been shipped and transported by way of the Great Lakes to various ports in the state of Wisconsin, and that it there accumulated and said produce was stored for transshipment by rail to the various points of destination in western states and Canada to be sold.

35 IV.

Defendants have insufficient information to enable them to admit or deny the allegation to the effect that during all of the times mentioned in said bill of complaint the said complainant owned and maintained, and still owns and maintains, extensive coal docks or any coal docks in the state of Wisconsin, with equipment and appliances for the handling, storage, transshipment and distribution of its coal products, and that it has handled, stored and transhipped from said docks any coal as in said bill of complaint alleged.

V.

Defendants have insufficient information to enable them to admit or deny the allegation to the effect that during all the times mentioned in said bill of complaint the said complainant was engaged in interstate and foreign commerce and maintained in the state of Wisconsin various docks, properties and facilities for the handling and conduct of such commerce, and that during said time said complainant sold and disposed of a relatively small part or portion of its entire coal tonnage handled through its docks and other facilities in the state of Wisconsin, and that it was engaged in such general business at the time of the commencement of this action.

VI.

Defendants are insufficiently informed to enable them to admit or deny the allegation that the complainant has laid out and invested in the state of Wisconsin many hundreds of thousands of dollars or any other sum or sums in the acquisition and improvement of its various dock and other properties used and employed in the carrying on and conduct of the business aforesaid and in the
36 installation of plants, machinery and appliances employed on said docks and used in connection therewith for the handling, storage and shipment of its said product, and that the complainant at the commencement of this action was the owner thereof, and that during the times alleged in the bill of complaint the said several properties owned by the complainant within the state of Wisconsin have been regularly taxed by said state, and that the complainant has paid to said state the taxes thereon levied and imposed and that the complainant has built up and established

during the times mentioned in the bill of complaint and at the time of the commencement of this suit had and maintained a permanent and established business within this state as in said bill of complaint alleged, and that the said business is of great value, and that interference with the conduct thereof will inflict upon the complainant great and irreparable loss and damage.

VII.

Defendants admit that on or about the first day of September, 1898, the legislature of the state of Wisconsin caused to be regularly enacted a law requiring foreign corporations to file in the office of the secretary of state a duly authenticated copy of its charter and pay to said sec. of state a fee of Twenty-Five (25) Dollars, and that said enactment contained, among other provisions, those set out in said bill of complaint. And the defendants aver that said law was contained in section 1770*b* of the Wisconsin statutes of 1898, and is set out here in full as follows:

"Section 1770*b*. No corporation, joint-stock company, express company or common-law partnership incorporated or organized otherwise than under the laws of this state, except corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies,
37 orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, shall transact business or acquire, hold or dispose of property in this state until such association, company, partnership or corporation shall have caused to be filed in the office of the secretary of state a duly authenticated copy of its charter, articles of association or incorporation or of copartnership, and all amendments thereto which may be made while it shall continue to do business therein. Such association, company, partnership or corporation causing a copy of its charter or articles to be so filed shall thereby be deemed to have made, constituted and appointed the secretary of state its true and lawful attorney upon whom all summonses, notices, pleadings or process in any action or proceeding against it may be served in respect to any liability arising out of any business, contract or transaction in this state, and thereby to have stipulated that service thereof upon the secretary of state or his assistant shall be accepted irrevocably as a valid service upon it; and such appointment and stipulation shall continue in force irrevocably so long as any liability of such association, company, corporation or partnership remains outstanding in this state. Actions may be brought against any such association or partnership in the name by which it is commonly known. Whenever any such summons, notice, pleading or process shall be so served the secretary of state shall forthwith mail a copy thereof, postage prepaid, and directed to such association, company, corporation or copartnership at its principal place of business, or if it be organized in a foreign country then to its resident manager in the United States, and also an additional copy to such association, company, corporation or copartnership at its foreign address, or in

any such case to such other person as may have been previously designated by it by written notice or request filed in his office. The failure to comply with any of the provisions of this section shall, for the first such violation, subject the association, company, corporation or copartnership or any agent, officer or person acting for it in this state to a penalty of five hundred dollars, to be sued for and recovered in the name of the state, with the costs of prosecution by the district attorney of any county in which it or any of its agents or officers shall be located or reside or transact or attempt to transact business; and such penalty, when recovered, shall be paid into the treasury of the county for the benefit of the school fund. Every subsequent violation of any such provision shall subject such association, company, corporation or copartnership or any of its agents or officers guilty thereof to a penalty of not less than one thousand dollars, to be sued for, recovered and disposed of in like manner. Every contract made by or on behalf of any such association, company, corporation or copartnership affecting the personal liability thereof or relating to property within the state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them. In case any joint-stock company, association or copartnership shall not have any articles of incorporation, organization, association or copartnership, it shall file in the office of the secretary of state, under the seal, if any, of the company or partnership, and under the signature of two of its
38 principal officers, and in case of a partnership under the signature of any member thereof, a written instrument appointing the secretary of state an attorney for the purpose of receiving service of summons, notice, pleading and process as aforesaid, and stipulating that the service thereof shall constitute personal service upon it; and be subject to like penalties for failure to comply with this provision as hereinbefore provided in case of a failure to file such articles. For filing such articles every such association, company, corporation or partnership shall pay to the secretary of state twenty-five dollars, and for amendments thereto ten dollars."

VIII.

Defendants admit that the complainant has regularly complied with the terms of said enactment and subsequently to the date of the adoption thereof and prior to the 10th day of November, 1898, caused a duly authenticated copy of its charter to be filed with the secretary of state of this state and paid the prescribed filing fee to be paid to said state, and that on or about the 10th day of November, 1898, the secretary of the state of Wisconsin caused to be issued to the complainant a license to do business within said state of Wisconsin.

IX.

Defendants have insufficient information to enable them to admit or deny the allegation in the said bill of complaint that the complainant had already, previous to the enactment of said section

1770*b* of the statutes of 1898, been engaged in carrying on and conducting a business of the general character alleged in the state of Wisconsin, and that the complainant at the time of enactment of said statute was in doubt whether the same was applicable to foreign corporations engaged in the line of business alleged to be carried on and conducted by complainant, and that, notwithstanding the said doubt, the complainant voluntarily complied with the terms of said enactment, and that it has since continued to
39 engage in the carrying on of the general business in this state and is now so engaged.

X.

Defendants admit that subsequent to the enactment by the legislature of section 1770*b* of the statutes of 1898, chapter 506 of the general laws of Wisconsin for the year 1905, was duly enacted into law, and that said chapter, among other provisions, contained those alleged in the said bill of complaint, and that said enactment was entitled—

"Act to amend section 1770*b* of the statutes of 1898 as amended by section 27, chapter 35, laws of 1899; section 1, chapter 399, laws of 1901; and section 1, chapter 434, laws of 1901; and creating four new sections to the statutes of 1898 to be known as 1770*f*, 1770*g*, 1770*h*, and 1770*i*, relating to foreign corporations."

That the same was approved June 20, 1905, and published July 1, 1905, and by its terms went into effect on and after the first day of October, 1905.

XI.

Defendants admit that none of the aforesaid legislation of the state of Wisconsin effected or imposed any requirements whatsoever upon domestic corporations organized under the laws of Wisconsin, and that the provisions and requirements thereof were exclusively directed at foreign corporations organized under the laws of other states than that of the state of Wisconsin, but the defendants deny that by reason of said fact, requirements and exactions were made by the terms of said law on foreign corporations engaged in business in the said state of Wisconsin which were not made upon and in no wise applied to or affected domestic corporations, notwithstanding both classes of such corporations were of similar character, exercising similar corporate franchises and engaged in the same lines of business within said state. Defendants aver that substantially the same requirements and exactions that were
40 made by said above named statute on foreign corporations engaged in business in the said state of Wisconsin, were also made on domestic corporations by other sections of the statute of the state of Wisconsin. That by chapter 507 of the general laws of Wisconsin for the year 1905, similar and substantially the same requirements were made of domestic corporations engaged in business in the state of Wisconsin as were required and made of foreign corporations engaged in business in the state of Wisconsin by said

chapter 505 of the laws of Wisconsin, of 1905. That said chapter 507 of the laws of Wisconsin, of 1905, was entitled—

"An act to amend section- 1772, 1773, 1774 and 1789 of the statutes of 1898, as amended by chapter 238 of the laws of 1901, and creating sections 1774*a*, 1791*j* and 1791*L*, relating to the organization of domestic corporations and filing of an annual report."

That the same was approved June 20, 1905, and published July 28, 1905, and by its terms went into force and effect on and after October 1st, 1905.

XII.

Defendants admit that on or about the 3rd day of August, 1912, a civil action was instituted by one Ole Huen, a citizen of the state of Wisconsin, as plaintiff, against the complainant as defendant, to recover against the complainant damages for personal injuries claimed to have been sustained by plaintiff while in the employment and service of the complainant in the state of Wisconsin. That said action was instituted by said plaintiff in the Superior court of Douglas County, Wisconsin, and that process therein was at or about said date served on the complainant. That thereafter, on or about the 21st day of August, 1912, the complainant caused to be presented to the Superior Court of Douglas County, Wisconsin, its petition for removal of said action into the United States district court in and for the western district of the state of Wisconsin, and that thereafter such proceedings were duly had on the petition of complainant that an order was made and entered by said Superior Court granting said petition and removing said cause into United States Court aforesaid, and that said cause is still pending and undetermined in said last named court.

41

XIII.

Defendants admit that subsequent to the proceedings last hereinbefore mentioned and the removal by the complainant of said action, and prior to the commencement of this suit, a petition in writing was presented by the attorney of the plaintiff in said action and filed with the secretary of state of the state of Wisconsin reciting the facts of the removal by the complainant of said cause as aforesaid and asserting that such removal was had in violation of the laws of the state of Wisconsin, and praying that said secretary of state should forfeit and annul the license of the complainant herein to do business within this state solely by reason of the fact in said petition alleged that the complainant had removed said cause into the United States district court.

XIV.

Defendants admit that at the commencement of this suit the above named defendant, J. S. Donald, was the duly elected and acting and qualified secretary of state of the state of Wisconsin, and the above named Walter C. Owen, was the attorney general of the said state.

XV.

Defendants deny on information and belief that the said above named statutes applying to foreign corporations constitute
42 and operate as a restriction upon and a direct interference with or regulation of the right and privilege of conducting and carrying on interstate commerce within the state of Wisconsin in violation of the provisions of section 8, article 1, of the constitution of the United States. And defendants further deny on information and belief that by virtue of the conditions imposed by the original enactment of the legislature of the state of Wisconsin in 1898, and the acceptance of the terms of said conditions by the complainant, a contract relation has resulted and that subsequent legislation of said state impairs the obligation of contract contrary to the terms of section 10 of article 1 of the constitution of the United States. Defendants further deny foreign corporations are required to affirmatively stipulate and agree to surrender the right and privilege secured by the constitution of the United States and the laws of Congress of removing actions or proceedings otherwise rightfully and lawfully removable to the courts of the United States. That the defendants further deny that said statutes relating to foreign corporations are unconstitutional for any reason specified in the bill of complaint of the complainant, nor for any reason whatever, but allege that the same are a valid enactment neither violating the constitution of the United States nor any laws enacted by Congress in pursuance thereto.

Wherefore, the defendants pray that the temporary injunction herein against these defendants be dissolved and that the bill of complaint and this suit be dismissed and that defendants have such further relief as may be just and equitable, together with their costs herein.

J. S. DONALD,
Secretary of State of Wisconsin;
WALTER C. OWEN,
Attorney General of Wisconsin,
Defendants.

WALTER C. OWEN,
Attorney General;
J. E. MESSERSCHMIDT,
Assistant Attorney General,
Solicitors.

43 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

Walter C. Owen being first duly sworn on oath deposes and says that he is one of the defendants in the foregoing answer subscribed by him and that he has read the same, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief and as to those matters he verily believes it to be true.

WALTER C. OWEN.

Subscribed and sworn to before me this 24th day of March, A. D., 1913.

J. E. MESSERSCHMIDT,
Notary Public, Dane County, State of Wisconsin.

Endorsed: 1-E Civil Docket. United States District Court, in and for the Western District of Wisconsin. The Philadelphia & Reading Coal & Iron Co., complainant, v. J. S. Donald, Sec'ty of State of the State of Wisconsin and Walter C. Owen, Att'y Gen'l of the State of Wisconsin, defendants. Answer of defendants. Due service of the within answer is hereby admitted at Superior, Wis., this 25th day of March 1913. Luse, Powell & Luse, solicitors for complainant. Filed Mar. 26, 1913, F. W. Oakley, clerk.

44 Afterwards, to-wit, March 26, 1913, filed admission of service, as follows:

United States District Court in and for the Western District of Wisconsin.

THE PHILADELPHIA & READING COAL & IRON COMPANY,
Complainant,
v.
J. S. DONALD, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin,
Defendants.

Due service of a copy of the answer of the defendants in the above entitled action is hereby admitted this 25th day of March A. D. 1913.

LUSE, POWELL & LUSE,
M. H. BOUTELLE,
Solicitors for Complainant.

Endorsed: 1 E. Civil Docket. The Philadelphia & Reading Coal & Iron Co., v. J. S. Donald, Sec. of State of State of Wis., et al. Admission of service. Filed Mar. 26, 1913. F. W. Oakley, clerk.

Afterwards, to-wit, September 17, 1914, filed interlocutory injunction, as follows:

45 United States District Court in and for the Western District of Wisconsin.

THE PHILADELPHIA & READING COAL & IRON COMPANY,
Complainant,
vs.
JOHN S. DONALD, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin, Defendants.

The complainant having filed its bill, praying for a final decree enjoining and restraining the defendants, John S. Donald as Secretary of State of the state of Wisconsin, and his successors in person, or by deputy, or assistant, and Walter C. Owen, Attorney General of the state of Wisconsin, and his successors in person, or by deputy, or assistant, from cancelling or revoking the license, or permit of the complainant to do business in the state of Wisconsin, or from taking any action, or causing any action to be taken against the complainant for or on account of an alleged violation of an act of the legislature of Wisconsin purporting to declare the license or permit of the complainant to do business within the state of Wisconsin, forfeited on accouunt of the removal of a cause from the state court of said state to the federal court, and praying that an interlocutory injunction be issued, forbidding such action on the part of the defendants, John S. Donald as Secretary of State of the state of Wisconsin, and his successors in person, or
46 by deputy, or assistant, and Walter C. Owen, Attorney General of the State of Wisconsin, and his successors in person, or by deputy, or assistant, during the pendency of this action, and until the final determination thereof.

And, five (5) days' notice of such application for such interlocutory injunction having been given to the defendants, John S. Donald, as Secretary of State of the state of Wisconsin, and his successors in person, or by deputy or assistant, and Walter C. Owen, Attorney General of the state of Wisconsin, and his successors in person or by deputy, or assistant,

And, the Judge of the District Court of the United States for the Western District of Wisconsin, to wit: Honorable Arthur L. Sanborn, having called to his assistance to hear and determine the said application, two (2) other judges, namely, Honorable Christian C. Kohlsaat, United States Circuit Judge, and Honorable Ferdinand A. Geiger, United States District Judge,

And, the said application having been heard before the said three (3) judges, and the said three (3) judges having heard solicitors for the complainant, and the said Attorney General of the state of Wisconsin for the defendant, and the matter having been submitted,

And, the said three (3) judges having on the 10th day of August, 1914, filed in said District Court of the United States for the West-

ern District of Wisconsin their decision granting an interlocutory injunction to the complainant as prayed for.

It is, therefore, ordered, that during the pendency of this action, and until final decree herein, the defendants, John S. Donald as Secretary of State of the State of Wisconsin, and his successors in person, or by deputy, or assistant, and Walter C. Owen, Attorney General of the state of Wisconsin, and his successors in per-
47 son, or by deputy, or assistant, are enjoined and restrained from cancelling or revoking the license or permit of the complainant to do business in the state of Wisconsin, or from taking any action, or causing any action to be taken against the complainant, for or on account of its alleged violation of an act of the legislature of Wisconsin, declaring, or purporting to declare, the license or permit of complainant to do business within the state of Wisconsin, forfeited on account of the removal of a cause from the state court of said state of Wisconsin to the federal court, and from making any entry of record in person, or by deputy, or assistant which would purport to cancel the said permit of the said complainant to do business within said state of Wisconsin.

Dated September 17, 1914.

By the Court.

A. L. SANBORN, *Judge.*

Endorsed: 1-E Civil Docket, United States District Court, Western District of Wisconsin. The Philadelphia & Reading Coal & Iron Company, complainant, vs. John S. Donald, Secretary of State, and Walter C. Owen, Attorney General, defendants. Interlocutory injunction. Filed Sep- 17, 1914. F. W. Oakley, clerk.

Afterwards, to-wit, September 17, 1914, came the defendants by their solicitors and filed petition for and order allowing appeal, as follows:

48 United States District Court in and for the Western District of Wisconsin.

THE PHILADELPHIA & READING COAL & IRON COMPANY,
Complainant,
vs.
JOHN S. DONALD, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin,
Defendants.

The above named defendants, John S. Donald, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin, conceiving themselves aggrieved by the interlocutory injunction entered on September 17, 1914, in the above entitled action, do hereby appeal from said interlocutory injunction to the Supreme Court of the United States and they pray that this their appeal may be allowed and that a transcript of the record and proceedings and papers upon which said interlocutory

injunction was made, duly authenticated, may be sent to the Supreme Court of the United States.

WALTER C. OWEN,
Attorney General,
J. E. MESSERSCHMIDT,
Assistant Attorney General,
Attorneys for Defendants and Appellants.

Office of Attorney General, Madison, Wisconsin.
Madison, Wisconsin, September 17, 1914.

And now, to wit: On September 17, 1914; it is ordered that the appeal be allowed as prayed for.

A. L. SANBORN,
District Judge.

49 Endorsed: 1-E Civil Docket. United States District Court, Western District of Wisconsin. The Philadelphia & Reading Coal & Iron Company, complainant, vs. John S. Donald, Secretary of State, and Walter C. Owen, Attorney General, defendants. Petition for appeal and order allowing appeal. Filed Sep- 17, 1914. F. W. Oakley, clerk.

On the same day, to-wit, September 17, 1914, filed assignment of errors, as follows:

50 United States District Court in and for the Western District of Wisconsin.

THE PHILADELPHIA & READING COAL & IRON COMPANY,
Complainant,
vs.
JOHN S. DONALD, Secretary of State for the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin,
Defendants.

And now comes John S. Donald, Secretary of State of the state of Wisconsin and Walter C. Owen, Attorney General of the state of Wisconsin, defendants, and make and file this their assignment of errors:

1. The United States District Court for the Western District of Wisconsin erred in refusing to grant the prayer of the defendants that the temporary restraining order against the defendants be dissolved and that the bill of complaint and this suit be dismissed.

2. The said court erred in granting the interlocutory injunction against the defendants herein.

3. The said court erred in its construction of the statutes of Wisconsin relating to foreign corporations.

4. The said court erred in holding that the Wisconsin statutes require a foreign corporation to stipulate or agree that it will not

remove into any district court of the United States any action or proceeding commenced against it by any citizen of Wis-
51 consin upon any claim or cause of action arising within said state.

5. The said court erred in holding as invalid and unconstitutional and as contravening the constitution of the United States the following provision of the Wisconsin statutes, that—

"Whenever any foreign corporation doing business in this state shall remove, or make application to remove, into any district court of the United States any action or proceeding commenced against it by any citizen of this state upon any claim or cause of action arising within this state, it shall be the duty of the secretary of state upon such fact being made to appear to him, to revoke the license of such corporation to do business within this state."

WALTER C. OWEN.
Attorney General,
J. E. MESSERSCHMIDT,
Assistant Attorney General,
Attorneys for Defendants Herein.

Endorsed: 1-E civil docket. United States District Court, Western District of Wisconsin. The Philadelphia & Reading Coal & Iron Company, complainant, vs. John S. Donald, secretary of state, and Walter C. Owen, attorney General, defendants. Assignment of errors. Filed Sep. 17, 1914. F. W. Oakley, clerk.

52 Afterwards, to-wit, September 21, 1914, filed bond on appeal, as follows:

District Court of the United States of America for the Western District of Wisconsin.

THE PHILADELPHIA & READING COAL & IRON COMPANY,
Plaintiffs,
vs.
JOHN S. DONALD, Secretary of State, and WALTER C. OWEN, Attorney General of the State of Wisconsin, Defendants.

(*Bond*)

Know all men by these presents that we, John S. Donald, Secretary of State, Walter C. Owen, Attorney General, of the State of Wisconsin, and United States Fidelity & Guaranty Co., of the city of Baltimore, County of — and State of Maryland, are held and firmly bound unto the above Philadelphia & Reading Coal & Iron Company in the sum of two hundred and fifty dollars ($250.00) to be paid to the said Philadelphia & Reading Coal & Iron Company for the payment of which well and truly to be made we bind ourselves and our successors firmly by these presents.

Sealed with our seal and dated the 17th day of September, in the year of our Lord, 1914.

Whereas the above named John S. Donald and Walter C. Owen have prosecuted and appealed to the Supreme Court of the United States to reverse the interlocutory injunction rendered in the above entitled suit by the judge of the district court of the United States for the Western District of Wisconsin;

Now, therefore, the condition of this obligation is such that if the above named John S. Donald, as Secretary of State, and Walter C. Owen, Attorney General, of the State of Wisconsin, shall
53 prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JOHN S. DONALD, [SEAL.]
Secretary of State.
WALTER C. OWEN, [SEAL.]
Attorney General.
UNITED STATES FIDELITY & GUARANTY CO.,
By C. F. LAMB,
[L. S.] *General Agent and Attorney in Fact.*

Sealed and delivered and taken and acknowledged this 17th day of September, 1914, before me

——— ———.

Approved by
A. L. SANBORN,
District Judge.

Endorsed: 1-E C. Dk. United States District Court, Western District of Wisconsin. The Philadelphia & Reading Coal & Iron Company, complainant, vs. John S. Donald, Secretary of State and Walter C. Owen, attorney general, defendants. Bond. Filed Sep. 21, 1914. F. W. Oakley, clerk.

September 23, 1914, filed præcipe for transcript, and admission of service as follows:

Service of the within præcipe admitted this 19th day of September, 1914. Luse, Powell & Luse, M. H. Boutelle, solicitors and counsel for complainant.

54 United States District Court in and for the Western District of Wisconsin.

THE PHILADELPHIA & READING COAL & IRON COMPANY,
Complainant,
vs.
JOHN S. DONALD, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin, Defendants.

To the Clerk of the United States District Court in and for the Western District of Wisconsin:

You will please prepare a transcript of the following papers constituting the record filed in the above entitled action in your office in the United States Court for the Western District of Wisconsin, to wit:

Bill in Equity, Subpœna, Motion for Temporary Injunction, Temporary Restraining Order, Notice of Appearance of the Attorney General of the State of Wisconsin, Answer of Defendants, Admission of Service of Answer, Order to Show Cause directed to the Defendants, Interlocutory Injunction, Petition for Appeal, Order Allowing Appeal, Assignment of Error, Appeal Bond and Approval, Citation, and Præcipe, and transmit the same to the Clerk of the Supreme Court of the United States, together with the appeal papers, for the use of said court in the trial of the appeal herein.

WALTER C. OWEN,
Attorney General,
J. E. MESSERSCHMIDT,
Assistant Attorney General,
Attorneys for Defendants.

55 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I, F. W. Oakley, Clerk of the District Court of the United States for said District, do hereby certify that I have compared the foregoing transcript of record with the original records of this Court new remaining of record in my office in the case therein lately pending of The Philadelphia & Reading Coal & Iron Company, complainant, vs. John S. Donald, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin, defendants, and that the same is a correct transcript thereof.

I further certify that the citation with the admission of service thereon hereto annexed is the original citation and admission of service granted in said cause.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said Court at the City of Madison in the said

Western District of Wisconsin this 24th day of September, in the year of our Lord one thousand nine hundred and fourteen and of the independence of the said United States the one hundred and thirty-ninth.

[Seal U. S. District Court, Western District of Wisconsin, Madison.]

F. W. OAKLEY, *Clerk,*
Clerk,
By FRED W. FRENCH,
Deputy.

September 17, 1914, citation issued in said cause, as follows, to-wit:

56 Original.

United States District Court in and for the Western District of Wisconsin.

THE PHILADELPHIA & READING COAL & IRON COMPANY,
Complainant,
vs.
JOHN S. DONALD, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin,
Defendants.

UNITED STATES OF AMERICA, *ss:*

To Messrs. Luse, Powell & Luse, Superior, Wisconsin, and M. H. Boutelle, Minneapolis, Minnesota, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the 17th day of October, nineteen hundred and fourteen, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Western District of Wisconsin, wherein John S. Donald, Secretary of State of the State of Wisconsin, and Walter C. Owen, Attorney General of the State of Wisconsin, are appellants and The Philadelphia & Reading Coal & Iron Company are respondents, to show cause, if any there be, why the interlocutory injunction in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 17th day of September, in the year of our Lord one thousand nine hundred and fourteen.

A. L. SANBORN,
District Judge.

[Endorsed:] 1-E Civil Docket. State of Wisconsin. United States District Court, Western District of Wisconsin. The Philadelphia & Reading Coal & Iron Company, complainant, vs. John S. Donald, Secretary of State, and Walter C. Owen, Attorney General, defendants. Citation. Service of the within citation admitted this 19 day of September, 1914. Luse, Powell & Luse, M. H. Boutelle, solicitors and counsel for complainant. Sept. 23, 1914. F. W. Oakley, clerk.

Endorsed on cover: File No. 24,380. W. Wisconsin D. C. U. S. Term No. 253. John S. Donald, secretary of state of the State of Wisconsin, and Walter C. Owen, attorney general of the State of Wisconsin, appellants, vs. The Philadelphia & Reading Coal & Iron Company. Filed September 26th, 1914. File No. 24,380.

Supreme Court, U. S.
FILED
MAR 1 1916
JAMES D. MAHER
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 163.

JOHN S. DONALD, Secretary of State of the State of Wisconsin, and WALTER C. OWEN, Attorney General of the State of Wisconsin,

Appellants,

vs.

THE PHILADELPHIA & READING COAL & IRON COMPANY,

Respondent.

Appeal from the District Court of the United States for the Western District of Wisconsin.

BRIEF FOR APPELLANTS.

WALTER C. OWEN,
Attorney General.
J. E. MESSERSCHMIDT,
Assistant Attorney General,
Attorneys for Appellants.

[illegible] PRINTING CO., MADISON, WIS.

SUBJECT INDEX.

	Page
Nature of Suit	1
Result	2
Statement of Facts	2
Assignments of Error	8
Argument	9
I. Policy of the State of Wisconsin Concerning Corporations	10
II. The Provision of the Wisconsin Statutes, that, if a Foreign Corporation shall Remove or Make Application to Remove into any District or Circuit Court of the United States any Action or Proceeding Commenced against it by any Citizen of Wisconsin upon any Claim or Cause of Action Arising within this State, the License Issued to said Corporation shall be Void and the Secretary of State shall enter such Forfeit in the Records in his Department, has not for its Object to Oust the Federal court of Jurisdiction, but the Primary Purpose is the Putting of Foreign Corporations on Substantially the same Footing as Domestic Corporations and such is the Result	13

Page

III. The Mandate of the Fourteenth Amendment to the Constitution of the United States, that no State shall Make or Enforce any Law which shall deny to any Person within its Jurisdiction the Equal Protection of the Laws, is Applicable to Remedial Rights 22

IV. The Rule of Comity goes only so far as to Place Foreign Corporations on an Equal Basis with Domestic Corporations, but never Beyond 30

V. The Rule of the Doyle and Prewitt Cases, Properly Qualified and Limited in its Scope, is Applicable to this Statute and is Sufficient to Sustain its Constitutionality 33

VI. A Foreign Corporation is not Required by the Statutes of Wisconsin, as a Condition for Receiving a License in the State of Wisconsin, to Stipulate that it will not remove a Case to the Federal Court 52

VII. A Stipulation Required to be Filed in the Secretary of State's Office by a Foreign Corporation that it will not Remove a Case to the Federal Court does not in any way Change the Effect of a Statute of this Nature 62

Page

VIII. The Wisconsin Statutes Relating to Foreign Insurance Companies do not in any way Interfere with or Affect Interstate Commerce 63

IX. The Revocation of the License of the Respondent Does not Deprive it of any Constitutional Rights 66

Summary 73

Conclusion 76

Appendix, Laws of Wisconsin Relating to Foreign Corporations ..... i–ix

CASES CITED.

	Page
Allen v. Milwaukee, 128 Wis. 678	64
Ashland L. Co. v. Det. S. Co., 114 Wis. 66	64
Bank of Augusta v. Earle, 13 Pet. 519	31
Barbier v. Connolly, 113 U. S. 27	23
Barron v. Burnside, 121 U. S. 186	38, 39, 52, 60
Beaser v. Barber A. P. Co., 120 Wis. 599	64
Bigelow v. West. R. Co., 27 Wis. 478	55
Blair v. Milw. etc. Ry. Co., 20 Wis. 254	66
Catlin & Powell Co. v. Schuppert, 130 Wis. 642	64
Chicago R. R. Co. v. Cutts, 94 U. S. 155	72
Chicago T. & T. Co. v. Bashford, 120 Wis. 281	64, 67–70
Chickering-Chase Bros. Co. v. White, 127 Wis. 83	64
Clark v. Central Ry. Co., 50 Fed. 338	30
Coe v. Rothman, 126 Wis. 515	70
Cohens v. Virginia, 6 Wheat. 399	50
Coler v. Tac. R. etc. Co., 65 N. J. Eq. 347	32
Cook, State v., 171 Mo. 348	32
Daniels v. Tearney, 102 U. S. 421	61
Doyle v. Continental Ins. Co., 94 U. S. 535,	21, 36, 38, 39, 45, 46, 47, 49, 54, 56, 59
Doyle, State ex rel. Drake v., 40 Wis. 175	17, 35, 36, 60
Drake v. Doyle, 40 Wis. 175	17, 35, 36, 60
Ducat v. Chicago, 10 Wall. 410	64
Durkee v. City of Janesville, 28 Wis. 464	25–28
Elwell v. Adder Machine Co., 136 Wis. 82	64, 70
Empire Mills Co. v. Alston G. Co., 15 S. W. 200	31
Falls v. U. S. Savings, Loan, etc. Co., 97 Ala. 417	32
Faulker v. Hyman, 142 Mass. 53	32
Fisher v. Lord, 63 N. H. 514	32
Fowler v. Bell, 90 Tex. 150	32
Furguson v. Landrum, 5 Bush. 230, 196 Am. Dec. 350	61

	Page
Granada Co. v. Brogden, 112 U. S. 261	55
Greek-Am. S. Co. v. Richardson D. Co., 124 Wis. 469	64
Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150	24
Harding v. Am. Glu. Co., 182 Ill. 551	32
Harrison v. St. L. & S. F. R. Co., 232 U. S. 318	45
Herndon v. Chi., R. I. & Pac. Ry. Co., 118 U. S. 135	43
Hiskey v. Pac. States Savings, etc. Co., 27 Utah, 409	32
Home Ins. Co. v. Morse, 20 Wall. 447	33, 39, 56, 60
Horn Silver Mining Co. v. New York, 143 U. S. 305	32, 64
Inde. Tug Line v. Superior L. & B. Co., 146 Wis. 121	18
Janesville v. Carpenter, 77 Wis. 288	29
Johns v. Milwaukee, 88 Wis. 389	55
Johnson v. Goodyear, 59 Pac. 304	24
Kellogg v. Currens, 111 Wis. 431	29
Louis. & N. R. Co. v. Kentucky, 183 U. S. 503	71
Ludwig v. W. U. Tel. Co., 216 U. S. 146	42
Madison, etc. Plank Road Co. v. Reynolds, 3 Wis. 287	66
Milwaukee Gaslight Co., State v., 29 Wis. 454	66
Missouri v. Kansas City, etc. Ry. Co., 32 Fed. 722	55
Missouri v. Lewis, 101 U. S. 22	25
Morse, Home Ins. Co. v., 20 Wall. 447	33, 39, 56, 60
National Cotton Oil Co. v. Texas, 197 U. S. 115	64
National Council v. State Council, 203 U. S. 163	40
Newport & C. Bridge Co. v. United States, 105 U. S. 470	73
New York & N. E. R. Co. v. Bristol, 151 U. S. 556	66
Osborne v. Florida, 164 U. S. 650	72

	Page
Palms v. Shawano Co., 61 Wis. 211	55
Paul v. Virginia, 8 Wall. 168	64
People v. Howard, 50 Mich. 239	32
Pratt v. Brown, 3 Wis. 603	66
Presbyterian M. Fund v. Thomas, 126 Wis. 281	31, 64
Prewitt, Security Mut. Life Ins. Co. v., 202 U. S. 246, 50 L. Ed. 1013	21, 38, 45, 46, 47, 49, 62
Pullman Co. v. Kansas, 216 U. S. 56	42
Randolph v. Builders, etc. Supply Co., 106 Ala. 501, 17 So. 721	24
Security Mut. Life Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. Ed. 1013	21, 38, 45, 46, 47, 49, 62
Singer Mfg. Co. v. McCollock, 24 Fed. 667	55
Smiley v. Kansas, 196 U. S. 447	64
Southern Ry. Co. v. Green, 216 U. S. 400	29, 42
State v. Cook, 171 Mo. 348	32
State v. Milw. Gaslight Co., 29 Wis. 454	66
State ex rel. Drake v. Doyle, 40 Wis. 175	17, 35, 36, 60
State ex rel. Kellogg v. Currens, 111 Wis. 431	29
Stricker, Ex parte, 109 Fed. 150	23
Swing v. Weston Lbr. Co., 205 U. S. 278	40
Tampa Waterworks Co. v. Tampa, 199 U. S. 241	64
Toomey v. Sup. Lodge K. P. W., 74 Mo. App. 507	32
United States v. Cent. Pac. Ry. Co., 118 U. S. 235	55
United States v. Coombs, 12 Pet. 75	55
United States v. Del. Ry. Co., 213 U. S. 366	72
United States Mort. Co. v. Gross, 93 Ill. 483	32
Van [illegible]uben v. Cent. Ry. Co., 178 Pa. St. 367	31
Walters v. Whitlock, 9 Fla. 86	32
Western Union Tel. Co. v. Julian, 169 Fed. 166	44
Western Union Tel. Co. v. Kansas, [illegible] U. S. 1	41
White v. Howard, 46 N. Y. 144	32

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 253.

JOHN S. DONALD, Secretary of State of the State of Wisconsin, and WALTER C. OWEN, Attorney General of the State of Wisconsin,

Appellants,

vs.

THE PHILADELPHIA & READING COAL & IRON COMPANY,

Respondent.

Appeal from the District Court of the United States for the Western District of Wisconsin.

BRIEF FOR APPELLANTS.

NATURE OF SUIT.

This is an appeal from a temporary injunction enjoining the Secretary of State of the State of Wisconsin from revoking the license

of the Philadelphia & Reading Coal & Iron Company, the respondent, to transact intrastate business in Wisconsin as a foreign corporation.

The application was made in the District Court of the United States for the Western District of Wisconsin. Judge Sanborn, the district judge, granted a preliminary restraining order under the provisions of section 262 of the Judicial Code. The case was heard on November 24, 1913, at Chicago, before Hon. Christian C. Kohlsaat, United States circuit judge, Hon. Ferdinand A. Geiger and Hon. Arthur L. Sanborn, district judges, under section 266 of the Judicial Code (Act March 3, 191., c. 231, 36 Stats., 1162 [U. S. Comp. St. Supp. 1911, p. 236]).

RESULT.

After having the matter under consideration for nearly ten months, decision was rendered August 10, 1914, in favor of the respondent, and the temporary injunctional order was thereupon issued.

STATEMENT OF FACTS.

The respondent is a corporation organized under the laws of the State of Pennsylvania.

The appellants are administrative officers of the State of Wisconsin.

The respondent is engaged in the general business of mining, producing, shipping and selling various coal products in the United States and foreign countries. For many years it has been continuously engaged, and is still engaged in the handling and sale of its products throughout the various northwestern states of the United States and Canada.

During the entire period thus covered much of the product intended for distribution and sale in the territory last indicated has been transported via the Great Lakes to western ports, where it is stored for trans-shipment and sale.

The respondent was engaged in the general business indicated, and had and maintained various docks and other facilities for that purpose at several lake ports within the State of Wisconsin, for a number of years prior to the enactment by the legislature of this state in 1898 of the first of the so-termed Foreign Corporation Statutes, hereinafter referred to.

As an incident to handling its business it had made extensive investments and had acquired and owned at the time the bill was filed, within the State of Wisconsin, various docks, with their equipment, machinery and appliances, upon which it has been regularly taxed by, and has paid taxes to this state.

The business thus conducted has, in the main, consisted in commerce between the various states, and the property acquired and

facilities provided by respondent in the State of Wisconsin have been incidental and instrumental to the carrying on and conduct of such commerce.

It is also alleged that in 1898 the legislature of Wisconsin for the first time enacted a foreign corporation statute applicable to foreign commerce or trading organizations doing business within the state; that this statute went into force and effect on the 1st day of December, 1898. The complainant sets out some of the provisions of said section and others are set out in the answer by the defendant. It was also alleged that, in 1905, by chapter 506, the legislature amended the Statutes of 1898 as to foreign corporations in various essential particulars; that in addition to the requirements made by the Statutes of 1898 the amendment provided that at the time of filing with the secretary of state, by foreign corporations, their charters or articles of organization, a sworn statement should be filed reciting various details connected with the corporate business and management. This sworn statement was further required to state that, as a condition of doing or continuing business within the State of Wisconsin, such corporation would comply with all the laws of the state relative to foreign corporations; that in subsec. 6, sec. 1770*b*, it provides that the license of such corporation shall be revoked if it shall remove any case or action brought against it by a citizen of the State of Wisconsin, by a claim or demand arising within that state, into the

United States courts; that the law also required a report to be filed with the secretary of state by the corporation.

It also sets forth other provisions of the amendment.

The bill alleges that subsequent to the enactment of the amendment last referred to an action was brought against complainant in the state courts of Wisconsin, by a citizen of that state, to recover damages for personal injuries received by plaintiff while in complainant's employ in that state, and that thereafter, and prior to the filing of the present bill, such proceedings were had and taken in the action indicated; that the same on petition of the complainant, defendant in said action as aforesaid, was duly removed into the United States district court for the western district of Wisconsin, and that said action is still pending and undetermined in said last named court.

It is further alleged that, following such removal, a petition was presented to the above named defendant Donald, secretary of state of Wisconsin, reciting the fact of such removal and praying the revocation of such license and that, unless restrained and enjoined, the defendants will revoke such license, to complainant's irreparable loss and injury in its established business and property.

The bill further alleges that the action of complainant in the removal of said cause to the United States court is the sole and exclusive ground upon which the threatened

revocation of complainant's license by defendants is predicated.

Relief is sought enjoining the consummation of the threatened acts on the ground that the local statutes forbidding such removal to the United States courts are intrinsically unconstitutional in that it is sought by said statutes to deny the exercise of a right granted by the constitution of the United States and the laws of Congress enacted in pursuance thereof, and that the acts themselves have sought to effectuate the unconstitutional purpose by requiring a stipulation and agreement on the part of all foreign corporations to refrain from exercising such constitutional rights.

In addition, and as applied to complainant upon the facts alleged in the bill, it is contended that said statutes are unconstitutional and void as involving an interference with interstate commerce, impairing the obligation of a contract, depriving of property without due process of law, and denying the equal protection of the laws to persons within the jurisdiction of the state.

The defendants in their answer admitted the existence of the corporation and its organization as alleged; that the defendants are citizens of the State of Wisconsin and of the western federal district and that the amount in controversy exceeds $3000. The defendants also aver that they have insufficient information to enable them to admit or deny the allegation concerning the facts relating to the business and property of the corporation in

the State of Wisconsin and of other facts not specifically admitted.

It is admitted that the complainant has regularly complied with the terms of sec. 1770*b* to the date of the adoption thereof and that prior to the 10th day of November, 1908, filed the copy of its charter with the secretary of state and paid the prescribed filing fees and that a license was issued to said corporation on that date. Defendants admit the subsequent amendment to said sec. 1770*b*, and state that none of the amendments affect or impose any requirements upon domestic corporations of the State of Wisconsin, but that by chapter 507, Laws of 1905, substantially the same requirements were made of domestic corporations engaged in business in the State of Wisconsin. Defendants admit that on or about the 3d day of August, 1912, a civil action was instituted by one Ole Huen, a citizen of the State of Wisconsin, as plaintiff, against the complainant, as defendant, for damages for personal injury claimed to have been sustained by plaintiff while in the employment and service of the complainant in the State of Wisconsin; that said action was instituted in the superior court of Douglas county, Wisconsin, and process served upon the complainant; that thereafter, on the 21st day of August, 1912, complainant caused to be presented to the superior court of Douglas county, Wisconsin, its petition for removal of said action to the United States district court for the western district of Wisconsin and that

said cause was thereupon removed to the United States court and is still pending and undetermined in said last named court. Defendants also admit that thereafter application was made by the plaintiff in said action to the secretary of state, reciting the facts of the removal of said action by the complainant herein to the federal court as aforesaid, and praying that said secretary of state should forfeit and annul the license of said complainant herein by reason of the fact of the removal of said cause into the United States district court. Defendants also admit that John S. Donald is the duly elected and acting secretary of state of the State of Wisconsin, and the above named Walter C. Owen is the attorney general of the said state. The defendants also deny on information and belief the conclusions of law contained in the bill.

ASSIGNMENTS OF ERROR.

1. The United States District Court for the Western District of Wisconsin erred in refusing to grant the prayer of the defendant that the temporary restraining order against the defendant be dissolved and that the bill of complaint and this suit be dismissed.

2. The said court erred in granting the interlocutory injunction against the defendants herein.

3. The said court erred in its construction of the statutes of Wisconsin relating to foreign corporations.

4. The said court erred in holding that the Wisconsin statutes require a foreign corporation to stipulate or agree that it will not remove into any district court of the United States any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within said state.

5. The said court erred in holding as invalid and unconstitutional and as contravening the constitution of the United States the following provision of section 1770*f* of the Wisconsin statutes:

> "Whenever any foreign corporation doing business in this state shall remove, or make application to remove, into any district court of the United States any action or proceeding commenced against it by any citizen of this state, upon any claim or cause of action arising within this state, it shall be the duty of the secretary of state, upon such fact being made to appear to him, to revoke the license of such corporation to do business within this state."

ARGUMENT.

The question before this court is whether section 1770*f* of the Wisconsin statutes is constitutional.

In presenting this question to this honorable court, we are not unmindful of the fact that statutes of other states which appear to con-

tain somewhat similar provisions have been declared to be violative of provisions of the constitution of the United States. But, believing that the corporation laws of the State of Wisconsin and the scope and purpose of the above provision present somewhat different issues to this court than those considered in said cases, and in view of the necessity of a law of this nature, we respectfully call the court's attention to the following argument which we believe gives sufficient grounds to sustain the constitutionality of this law.

We deem it our duty, as public officers of the State of Wisconsin, to again urge upon the honorable court the consideration of this question and the reasons for the need of this law, and that the same is consistent with that mutual comity and respect which should prevail between the state and general government.

I.

Policy of the State of Wisconsin Concerning Corporations.

The State of Wisconsin has always endeavored to place foreign and domestic corporations doing intrastate business within its borders on substantially an equal footing. The corporation laws of this state do not contain any discriminations against any foreign corporation nor any provisions favoring corpora-

tions that have been created under the laws of the State of Wisconsin. This policy is not only exemplified in all the provisions of the Wisconsin corporation laws, but finds expression in the specific provisions of subsec. 10, sec. 1770*b*, which are as follows:

> "All foreign corporations and the officers and agents thereof doing business in this state shall be subjected to all the liabilities and restrictions that are or may be imposed upon corporations of like character organized under the laws of this state, and shall have no other or greater powers."

Thus, when a license fee is imposed upon a domestic corporation, a like fee is also placed upon a foreign corporation of the same nature. When a report of its business and property is required of one, it must also be made by the other. Forfeitures are imposed equally for like offenses and no advantage is given to either. It is not necessary to enumerate the various provisions in which this policy finds expression, for the corporation laws of Wisconsin are very extensive and it is not made necessary for the reason that we understand that counsel for respondent do not and cannot point out any substantial discrimination under the laws of this state against foreign corporations; and the trial court herein has found that there is no discrimination unless it be found in the said provision of section 1770*b*, above quoted, which will be considered hereinafter.

It must be remembered, in connection with this question, that Judge Ferdinand A. Geiger and Judge Arthur L. Sanborn, who, with Judge Christian C. Kohlsaat, heard the instant case in the lower court, are federal district judges of the State of Wisconsin, having formerly practiced law within the jurisdiction of said state and being conversant with the laws concerning corporations, and, after examination of the same, have come to the following conclusion in their opinion expressed, to wit:

> "The consistent policy in Wisconsin has been to encourage foreign corporations to do business in the state by making their status the same as that of domestic companies, but to prevent them from carrying on business there unless licensed, so as to collect from them taxes or license fees commensurate with those exacted from the local bodies, and making them readily suable there. This policy of equality appears from the statute, and is emphasized by subdivision 10 of section 1770*b*, adopting from Illinois a provision that foreign corporations shall have no other or greater powers than like domestic bodies, and from the uniform construction of these statutes by the state officers." (Trans. p. 21.)

In view of said policy, which cannot be successfully controverted, we will now consider the purpose and reasons for the enactment of the statute in question.

II.

The Provision of the Wisconsin Statutes, that, if a Foreign Corporation shall Remove or Make Application to Remove into any District or Circuit Court of the United States any Action or Proceeding Commenced Against it by any Citizen of Wisconsin upon any Claim or Cause of Action Arising within this State, the License Issued to Said Corporation shall be void and the Secretary of State shall enter such Forfeit in the Records in his Department, has not for its Object to Oust the Federal Court of Jurisdiction, but the Primary Purpose is the Putting of Foreign Corporations on Substantially the same Footing as Domestic Corporations, and such is the Result.

It will be observed that this provision of the statute does not prohibit a foreign corporation from resorting to the federal court when it begins a suit of its own accord against any citizen of the State of Wisconsin. It may begin any suit or proceeding in a federal court against any citizen of the state and its license cannot be revoked on that ground. If a citizen of the State of Wisconsin brings an action against a foreign corporation in a federal court, the foreign corporation is permitted to defend such action and no revocation of its license can take place on that

ground; neither can the license be revoked because a case has been taken by a writ of error from the supreme court of the state to the federal court of the United States for the purpose of litigating federal questions that may arise in the case. The restriction of the provision is further limited to causes of action that arise within the State of Wisconsin. Only when cases that have been started by citizens of the state against a foreign corporation in a court of the state on a cause of action arising within the state are removed to either the district or circuit court of the United States, then its license must be revoked. This is for the purpose of placing the foreign corporation on exactly the same basis as a domestic corporation.

Without this provision in the statute, a foreign corporation, such as the complainant, may remove every action that may arise in the State of Wisconsin brought against it by a citizen of the state from the state court to the district or circuit court of the United States. Such corporation may, therefore, entirely take away from every citizen of the state the right to have a controversy that arises between it and such citizen determined and tried in the courts created for that purpose by the constitution and statutes of the state. It may entirely take away from the state courts the right to try any such cases.

This is possible simply because a foreign corporation is a citizen of another state. A domestic corporation cannot remove a case

from a state court to the district or circuit court of the United States unless a federal question is involved, for the reason that a domestic corporation is a citizen of the State of Wisconsin. The result is, that all statutes enacted in the State of Wisconsin as to court procedure, and as to the methods of enforcing claims of the citizens of the state against corporations, may be successfully circumvented by a foreign corporation by removing all of its cases to the federal courts. As an illustration, we direct the court's attention to section 4096 of the Wisconsin statutes providing for the adverse examination of the officers and employees of corporations prior to the trial, and requiring the production of the books of the corporation, which is a statute that has shown itself to be of great value in litigations against corporations and to be entirely reasonable and just in its requirements.

Another example is ch. 219, Laws of 1915, being an act to simplify and expedite legal procedure, and enacted by the last legislature of the state on recommendation of the board of circuit judges and judges of the supreme court. If the statute in question herein is declared unconstitutional, then the state is powerless to enact any law which shall improve in any way the procedure in court and reach foreign corporations doing an intrastate business within its borders. The statutes enacted to secure to the citizens of the state the remedial rights guaranteed to them by the constitution can

be successfully circumvented by a foreign corporation, while a domestic corporation of like nature doing both domestic and interstate business, and which, perchance, may be exercising functions as an agent of the federal government the same as a foreign corporation is subject to these local laws.

Under the provisions of the state laws, a citizen of the State of Wisconsin may bring an action against a domestic corporation in any county in the state where he may reside and where the corporation transacts business. The action may be tried, as a general rule, in the county in which the witnesses of the plaintiff are located. A removal of the action to the United States court will harass such a citizen and will cause not only delay in the suit but also additional expense and other inconveniences. The court will take judicial notice of the fact that some of the counties in the state are located a great distance from the federal courts. These matters are so well known that legislators and courts have taken notice of the fact, the legislature enacting statutes as the one under consideration designed to remedy the defect and courts giving free expression to these matters. Judge Sanborn and Judge Geiger made candid statements of it in the opinion filed deciding the instant case, in which they say:

> "Provisions designed to prevent the removal of causes to federal courts, like that of section 1770*f* and the insurance statute

under review in *State ex rel. Drake v. Doyle*, 94 U. S. 535, 24 L. Ed. 148, were found necessary by the unreasonable and oppressive conduct of the foreign corporations themselves in removing cases merely for greater delay, vexation and expense. It used to be common practice in Wisconsin for foreign corporations under injunction from state courts to remove the case on a Saturday afternoon, thus *ipso facto* vacating the state injunction, and then hustle a gang of men upon the enjoined work and get it done by Monday, before any other restraining order could issue." (Trans. p. 22.)

The supreme court of the State of Wisconsin, in *State ex rel. Drake v. Doyle*, 40 Wis. 175, 194, through Justice Ryan, used the following language:

"The statute extended to these foreign insurance companies the privilege of doing business in this state on equal footing with domestic companies. Experience showed their powers to harass the citizens of the state doing business with them by removing actions on their policies from courts of this vicinage to distant and expensive tribunals. Hence the provisions of both statutes. And, conceding to the fullest extent the right of removal of actions commenced, we can see no pretense for questioning the power of the state, in the exercise of its absolute discretion on the subject, to revoke the license of a company exercising the right. The state has power to make its voluntary license subject to forbearance of a right, and revocable upon its exercise."

Judge Vinje, in a later case, that of the *Independent Tug Line v. Superior L. & B. Co.*, 146 Wis. 121, 123, speaking of sec. 1770*b*, said:

> "The conditions of the section in question are imposed upon foreign corporations for the purpose of protecting our citizens in their dealings with each other, viz., to have the right to sue them in the courts of this state in respect to any liability arising out of any business contract or transaction within the state—surely not an unreasonable condition. Nor is the burden of complying with the statute an onerous one."

It will readily be seen that, without this provision under consideration, a foreign corporation can do business in the State of Wisconsin under better conditions than a domestic corporation is permitted to do. No citizen of the state can enforce against a foreign corporation his rights and have the advantage of the statutes enacted as to the procedure in court; nor can he have the advantage of the courts created by the state to secure his constitutional and legal rights. It needs no argument in this court to impress it with the importance of the remedial rights of the citizen of a state. They are of the greatest importance and have been guaranteed to him by constitutional enactments. It is our insistence that the state has the right to enact all laws that have for their object and effect the placing of foreign corporations on the same footing as domestic corporations. The state has a right to require foreign corporations to be subject

to the same laws as to procedure as a domestic corporation, if the foreign corporation is attempting to do business within the state.

In other words, a sovereign state has the right to impose such conditions upon a foreign corporation for doing intrastate business as will place such foreign corporation on a footing with similar domestic corporations transacting the same business. However, this phase of the argument will be taken up later, when the constitutional basis upon which our contention is predicated will be definitely set forth.

It has been suggested and argued in the lower courts that, because a domestic corporation may remove a case where a federal question is involved from the state court to the federal court, this statute is discriminatory against foreign corporations on the ground that a foreign corporation has not the right to remove a case to the district court, on the same grounds. At first blush this would seem to be a discriminatory provision, but, upon careful consideration, it is apparent that no substantial rights of a foreign corporation are interfered with and that no substantial rights are given to a domestic corporation by this phase of the law. A foreign corporation is not deprived of the right to have the federal question in any case decided by the United States court for the reason that any case may be taken on a writ of error to the United States supreme court after the state court has passed upon the question, for the purpose of

determining the federal question. For that reason it was considered by the lawmakers as not a discrimination against foreign corporations to provide that their license should be revoked if they would remove a case to the federal court.

The legislature could not pass a valid law prohibiting domestic corporations from removing a case to the federal court when a federal question is involved. The object of the law here in question was not to oust the federal court of any jurisdiction, but to place foreign corporations on the same footing as domestic corporations, and it was thought to be superfluous to enact a law ousting the federal court of the jurisdiction to try the actions of domestic corporations where a federal question was involved when the foreign corporations were not deprived of the right to have the federal questions decided by the federal court. If this should be considered as a discrimination against foreign corporations, it is so shadowy that it should not decide this case in favor of the complainant. On this point the trial court in its opinion said:

> "The only discrimination we are able to perceive in the Wisconsin law, in favor of domestic and against foreign corporations, is a very narrow one. Foreign corporations are not allowed to remove cases against them by citizens of Wisconsin, on causes of action there arising. The same rule applies to domestic corporations under section 28 of the Federal Judicial Code, which does not

allow defendants to have removal for diverse citizenship unless they are non-residents of the state. Hence domestic corporations cannot exercise such a right. If, however, the suit against the domestic corporation presents a federal question, and more than $3000 is in dispute, it may remove the case, though a citizen and resident of the state, and though the plaintiff is a citizen of the same state and the cause of action arose therein. To this limited degree there is discrimination; but instances of such cases would be very rare. The question of the right to remain in the state may also be litigated by the foreign corporation in the state courts, with a final right of review in the supreme court by writ of error to the highest state court. It is unnecessary on these motions for injunctions to pass on this narrow question because a consideration of the second point referred to seems to require the court to direct the temporary injunctions prayed." (Trans. p. 21.)

On this point this legislation is within the rule laid down in the cases of *Security Mutual Life Insurance Company v. Prewitt*, 202 U. S. 246, and *Doyle v. Continental Insurance Company*, 94 U. S. 535.

In both of these cases the same discrimination was present in the statute and the court did not consider the same as a substantial discrimination, for in the former case, at page 257, the court used the following language:

"The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones doing business in Kentucky."

In those cases the fact that a domestic corporation could remove a case in which a federal question was involved to the federal court, and that the federal corporation could not remove such a case to said court on the same ground, was not considered as a substantial discrimination, for the state is not depriving the foreign corporation from having the federal question settled in the federal court. As an offset to this advantage the foreign corporation may bring an action in the federal court when no federal question is involved, which a domestic corporation cannot do. The lawmakers evidently considered this form of the enactment the most practical and most easy of administration. It would be difficult to frame a law in which equality could be more nearly attained than in the law in question.

III.

The Mandate of the Fourteenth Amendment to the Constitution of the United States, that no State shall Make or Enforce any Law which shall deny to any Person within its Jurisdiction the Equal Protection of the Laws, is Applicable to Remedial Rights.

The equal protection of the law is denied by a state court when it is apparent that the same law or course of procedure would not

and could not lawfully be applied to any person in the state under similar circumstances. *Ex parte Stricker*, 109 Fed. 150. That persons belonging in the same class should have equal access to courts is required under the Fourteenth Amendment.

In the case of *Barbier v. Connolly*, 113 U. S. 27, Justice Field, speaking for the court, said:

> "The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts;* that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." (Italics ours.)

In the case of *Railway Co. v. Ellis*, 165 U. S. 150, the statute under consideration allowed an attorney's fee of $10 to be taxed in the costs in case of recovery in favor of a plaintiff having a claim of less than $50 against a railway company, not paid within thirty days after its presentation, for labor, damages, overcharges or for stock killed or injured, and the act was held to be in contravention of the Fourteenth Amendment because denying equal protection of the law as it applied only against railway companies and in favor only of persons having certain demands not to all alike. The Fourteenth Amendment by Brannon, 335.

A statute in California gave a lien for wages to laborers and required payment of such wages once a month. It was held void under the Fourteenth Amendment as class legislation applicable only against corporations and in favor of their employees.

Johnson v. Goodyear, 59 Pac. 304.

A statute may not constitutionally give a lien to certain persons named therein.

8 Cyc. 1076;
Randolph v. Builders, etc. Supply Co., 106 Ala. 501, 17 South. 721.

"State courts may be arranged, jurisdiction fixed, the procedure fixed, the effects of their judgments declared and one law made operative in one section of the state, another in another section, without its being considered denial of equal protection under the amendment, if the legislation touching

the same be applicable to all alike under like circumstances."

The Fourteenth Amendment by Brannon, 343, citing *Mo. v. Lewis*, 101 U. S. 22.

A state under republican form of government is as imperatively bound to give equal remedial rights as it is to impose equal burdens and obligations.

Brief of Counsel in *Mo. v. Lewis*, 101 U. S. 22, 27, and cases cited.

In the case of *Durkee v. City of Janesville*, 28 Wis. 464, this court held:

"As a rule acts of the legislature exempting particular individuals or corporations by name from the operation of general laws are not within the proper scope of the legislative power and are void."

This was a case in which a law which exempted the city of Janesville from costs in certain cases where other corporations or persons were liable was under consideration by the court and declared unconstitutional. The court said at page 465:

"By an amendment of the charter of the city, P. and L. Laws of 1862, ch. 107, sec. 15, and a further amendment, P. and L. Laws of 1869, ch. 298, sec. 8, it is declared that no cost shall be recovered against the city in any action where the same is commenced to set aside any tax assessments or tax deed, or to prevent the collection of taxes or assess-

ments in said city. It is said in answer, that these provisions of the charter are inoperative and void, because in violation of that principle of constitutional law which prohibits unequal and partial legislation upon general subjects—the enactment of a special law dispensing with the general law in a particular case, or granting to one man or corporation, by way of exemption from the operation and effect of a general law, a privilege or indulgence which no other person or corporation has or enjoys. There is no reason to doubt the existence or correctness of the constitutional principle, which forbids such legislation. Enactments of the kind have frequently been held unconstitutional and void. In *Bull v. Conroe*, 13 Wis. 238, 244, it was held by this court that the general laws exempting property from seizure and sale on execution could not be varied for particular cases and localities. An act suspending the statute of limitations in favor of an individual has been held invalid. *Holden v. James*, 11 Mass. 396. And so an act 'empowering' a judge of probate to take an administration bond in a mode differing from that prescribed by the general laws of the state. *Ricquet, Appellant*, 5 Pick., 65. Also an act granting an appeal from the decree of the probate court in a particular case, contrary to the provisions of the general law. *Lewis v. Webb*, 3 Greenl., 326. An act to grant a review in a suit between private citizens. *Durham v. Lewiston*, 4 Greenl., 140. An act making it a felony in the officers, agents or servants of a particular banking corporation, to embezzle or appropriate without authority the funds of the corporation, was adjudged a partial law, and unconstitutional and void, because

it did not embrace all persons in like state, and surrounded by similar circumstances. *Budd v. The State*, 3 Humph. 483. And the same was determined of an act authorizing the court to dismiss Indian reservation cases, when prosecuted for the use of another. It was a partial law, intended to operate only upon a few individuals. *Wally's Heirs v. Kennedy*, 2 Yerg., 554. And so also of an act creating a special court for the determination of suits commenced by a particular bank against its officers, and other persons in default to it. *State Bank v. Cooper*, 2 Yerg., 599. An act authorizing the executors of one person deceased to revive a judgment obtained by another person in his life time, in their names by *scire facias*, was decided to be partial in its character, and not the law of the land, and void. *Tate v. Bell*, 4 Yerg., 202. And likewise an act authorizing a particular person named to prosecute a suit then pending in the name of the deceased party plaintiff, without taking out letters of administration upon the estate of such deceased. *Officer v. Young*, 5 Yerg., 320. And so also an act which authorized the guardians of the minor heirs of a deceased person to sell lands which descended to the heirs from their ancestor, and apply the proceeds in payment of the ancestor's debts, though passed with the assent of such minor heirs, was held unconstitutional and void. *Jones' Heirs v. Perry*, 10 Yerg., 59. And see also *Simonds v. Simonds*, 103 Mass. 572.

"The principle thus clearly shown by the decisions, if applicable to the acts under consideration, seems conclusive against their validity. And I think they are invalid. Certainly no discrimination more arbitrary,

unjust and odious, between one individual or corporation and another, or every other, in a matter where the rights and privileges of all should be equal, could well be, than would thus be established, if such acts were valid. The city of Janesville would have a special privilege or advantage not given to any other like corporation under the same circumstances."

At page 470 the court continued:

"And if the legislature might thus exempt the *city of Janesville* from the operation of a general law, or from burdens cast upon all other corporations and persons, under like circumstances, then why might it not, in like manner, exempt any other corporation or person by name, thus opening the door to the greatest corruption, partiality and favoritism? It is not perceived where acts of this kind would end, if once begun, and held to be a legitimate exercise of legislative power."

And at page 471:

"Certainty of remedy implies uniformity of remedy and equality of rights and privileges in all things respecting it, which can only be obtained by general laws, equally binding upon every member of the community. The language denotes that there can be but one remedy for all similar cases, which must operate upon all persons or parties alike, and be equally free and favorable to all."

See also:

City of Janesville v. Carpenter, 77 Wis. 288;
State ex rel. Kellogg v. Currens, 111 Wis. 431.

In the case of *Southern Railway Co. v. Green*, 216 U. S. 400, it was held that a corporation which comes into the state other than that in which it is created, pays taxes thereto, and acquires property, and carries on business therein, is within the jurisdiction of that state, and, under the Fourteenth Amendment, is entitled to protection against any statute of that state, depriving it of the equal protection of the law.

The same principle is applicable to a domestic corporation.

It was also held in that case that a classification, which divides corporations doing exactly the same business with the same kind of property into foreign and domestic, in a tax law, is arbitrary, and a denial of equal protection of the law. The peremptory requirements of the Fourteenth Amendment, of equality to all persons within the jurisdiction of a state, belonging to the same class, requires a state, when it empowers these artificial persons to do intrastate business within its borders, to place them on substantially an equal footing.

IV.

The Rule of Comity goes only so far as to place Foreign Corporations on an Equal Basis with Domestic Corporations, but never Beyond.

Thompson on Corporations, (2d ed.) vol. 5, § 6628, expresses this rule in the following language:

> "The principle of comity permits a foreign corporation to exercise only those powers within the state which a domestic corporation of the same kind is permitted to exercise under the constitution, the laws and the policy of the state, and such a corporation may not exercise powers and privileges which were denied to domestic corporations of like character. It is another expression of the principle to say that a foreign corporation will not be allowed to transact business within the state on more favorable conditions than prescribed by law for domestic corporations though it is given authority to do such acts by the laws of the state of its incorporation."

The same principle was laid down in the case of *Clark v. Central Railway Company*, 50 Fed. 338, as follows:

> "Comity between the states will not authorize a foreign railroad corporation to exercise powers within the state which a domestic corporation would not be permitted

to exercise under the constitution and policy of the state." (Syllabus.)

In *Van Steuben v. New Jersey Central Railway Co.*, 178 Pa. St. 367, at page 373, the following language was used:

> "A corporation being the mere creature of local law can have no legal existence beyond the limits of the sovereignty where created. The recognition of its existence even by other states, and the enforcement of its contracts made therein depend purely upon the comity of these states, a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interest or repugnant to their policy."

The supreme court of the State of Wisconsin in the case of *Presbyterian Ministers Fund v. Thomas*, 126 Wis. 281, at page 285 said:

> "The rule of comity claimed by respondent would place foreign corporations on more favorable ground in the transaction of insurance business with residents of this state than domestic corporations and foreign corporations duly licensed. The rule of comity does not go to this extent." Citing:
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> 6 Thompson, Corp. § 7885;
>
> 2 Morawetz, Private Corp., (2d ed.) § 965;
>
> *Empire Mills Co. v. Alston G. Co.*, (Tex. App.) 15 S. W. 200;
>
> *Bank of Augusta v. Earle*, 13 Pet. 519, 592.

In the case of *Horn Silver Mining Co. v. New York*, 143 U. S. 305, at page 315, the court said:

> "It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

Quotations from courts of last resort might be multiplied almost indefinitely to the same effect as the above holding that the rule of the comity does not go so far as to permit a foreign corporation to exercise powers within the state that a domestic corporation of the same kind is not permitted to exercise under the constitution, laws and policy of the state.

We content ourselves in calling the court's attention to the following authorities:

Hiskey v. Pac. States Savings etc. Co., 27 Utah, 409;
Fowler v. Bell, 90 Tex. 150;
Coler v. Tacoma R. Etc. Co., 65 N. J. Eq. 347;
White v. Howard, 46 N. Y. 144;
Falls v. U. S. Savings, Loan, etc. Co., 97 Ala. 417;
Walters v. Whitlock, 9 Fla. 86;
Harding v. Am. Glucose Co., 182 Ill. 551;
U. S. Mort. Co. v. Gross, 93 Ill. 483;
Faulker v. Hyman, 142 Mass. 53;
People v. Howard, 50 Mich. 239;
State v. Cook, 171 Mo. 348;
Toomey v. Supreme Lodge K. P. W., 74 Mo. App. 507;
Fisher v. Lord, 63 N. H. 514.

V.

The Rule of the Doyle and Prewitt Cases, Properly Qualified and Limited in its Scope, is Applicable to this Statute and is Sufficient to Sustain its Constitutionality.

The first case in this court in which the question presented in the instant case was squarely before the court was a case that originated in the State of Wisconsin, that of *Insurance Company v. Morse*, 20 Wallace, 447. The insurance laws enacted in 1870 contain the provision that before any foreign insurance company was permitted to do business in the state it should "first appoint an attorney in the state on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States circuit court or federal court and file in the office of the secretary of state a written instrument duly signed and sealed certifying such appointment, which shall continue until another attorney shall be substituted." The Home Insurance Company of New York established an agency in the state and appointed H. S. Durand as its agent on whom process might be served.

The power of attorney thus filed contained this clause:

> "And said company agrees that suits commenced in the state courts of Wisconsin shall not be removed by the acts of said company into the United States circuit or federal courts."

An insurance policy was issued to one Morse, and a loss having occurred under it, Morse sued in the county court of Winnebago county, one of the said courts of Wisconsin, to recover the amount alleged to be due on the policy. The company entered its appearance and filed its petition to remove the case in proper form as was required by the United States statute. The petition was accompanied by the required bond and bail. The state court in which the suit was brought held that the statute of the state above quoted, and the agreement under it, justified a denial of the petition. It was therefore denied and a trial was had and judgment given to the plaintiff for the claim sued for. The case was taken to the supreme court of the state and affirmed (30 Wis. 496). Thereupon the insurance company brought the case to this court on writ of error. This court held that the Wisconsin statute in question was repugnant to the constitution of the United States and the laws in pursuance thereof, and that the agreement of the insurance company, filed in pursuance of the act, derived no support from a statute thus unconstitutional, and was as void as though no such statute had been passed.

Subsequent thereto an action was started in the name of the state on the relation of one

Drake against the secretary of state in the supreme court to compel the secretary of state to revoke the license of the Continental Insurance Company of New York on the grounds that said company had removed a case started against it in the circuit court for Winnebago county to recover the amount of damages caused by the destruction of property which was insured by the defendant. In that case a mandamus was issued to the secretary of state requiring him to revoke the license of the insurance company. The court held that, although the agreement made by the company not to remove a case to the federal court started by a citizen of the state against it in one of the state courts was void because repugnant to the constitution of the United States, the statute requiring the secretary of state to revoke the license, however, upon such removal in the same act was constitutional. See *State ex rel. Drake v. Doyle*, 40 Wis. 175. A distinction was drawn between the validity of the agreement and the validity of the statute as a whole. The opinion was written by Chief Justice Ryan, one of the brightest intellects that has ever graced a court of a sovereign state, and the rule was there first announced that a state had the absolute right to say upon what terms a foreign corporation should be permitted to do intrastate business within the borders of a sovereign state, and that although the state had not the right to prohibit a foreign corporation from removing cases started against it in

state courts, by citizens of the state, to the federal court, the state did have the right to revoke the license if such removal were exercised. Thereupon an injunction was secured from the federal court of the western district of Wisconsin, restraining the secretary of state from revoking the license. This case was appealed to the supreme court and is reported as *Doyle v. Continental Insurance Company*, 94 U. S. 535. In that case this court took practically the same position as was taken by the supreme court of the state of Wisconsin in the case of *State ex rel. Drake v. Doyle, supra*, and held that, although the agreement made by the company that it would not remove a case to the federal court was void, the condition in the statute, which required the secretary of state to revoke the license if a removal were actually made, was valid.

In deciding said case the court used the following pertinent language:

> "The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a state is always revocable. *Rector v. Philadelphia*, 24 How. 300; *People v. Roper*, 35 N. Y. 629; *People v. Comrs.*, 47 N. Y. 501. * * *
>
> "A license to a foreign corporation to enter a state does not involve a permanent right to remain, subject to the laws and constitution of the United States. Full power and control over its territories, its citizens and its business belong to the state.

"If the state has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. * * *

"If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a state are subject to still less inquiry, either as to the act itself or as to the reason for it. * * *"

Again the court said:

"The statute of Wisconsin declares that if a foreign insurance company shall remove any case from its state court into the federal courts, contrary to the provisions of the act of 1870, it shall be the duty of the secretary of state immediately to cancel its license to do business within the state. If the state has power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made.

"It is said that we thus indirectly sanction what we condemn when presented directly, towit: that we enable the state of Wisconsin to enforce an agreement to abstain from the federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the state may compel the foreign company to abstain from the federal courts or cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state; that state has authority at any

time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice or the wrong that is alleged to exist, must determine the question."

Subsequently, the case of *Barron v. Burnside* was decided in 121 U. S. 186. It was held that the statute of Iowa, which required that every foreign corporation named in the act shall, as a condition of obtaining a permit for the transaction of business in Iowa, stipulate that it will not remove into the federal court certain suits which it would by the laws of the United States have a right to remove, is void because it makes the right to a permit dependent upon the surrender by a foreign corporation of a privilege secured to it by the constitution and the laws of the United States.

The case of *Doyle v. Continental Insurance Company*, 94 U. S. 535, was not expressly overruled in this case, but was distinguished.

Later a statute of the State of Kentucky came before this court in *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013. This statute, which is known as Act 631 of the Kentucky statutes, contained, among other things, the following:

"And, if any company shall, without consent of the other party to any suit or proceeding brought by or against it, in any court of this state, remove such suit or proceeding to any federal court, or shall insti-

tute a proceeding against any citizen of this state in any federal court, it shall be the duty of the commissioners to forthwith revoke all authority to such company and its agents to do business within this state."

This statute was held to be good. In this case will be found a careful analysis of the decisions in the cases of *Home Insurance Company v. Morse; Doyle v. Continental Insurance Co.*, and *Barron v. Burnside*, and other cases. The court said at page 1018:

"It has not been decided that a statute which has no requirement for a stipulation or agreement not to remove is void, if there be simply a provision therein for a revocation of the permit, such as is contained in the statute under review.

"As a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial.

"Counsel for the companies, in their brief, admit that the state has the right at any time to pass a statute expelling a company or revoking its license, and the validity of the statute or expulsion would not be affected by the motives of the state in so doing, even though the preamble expressly recited that the license was revoked because the company had removed a case. The statute would be valid—for the company had no constitutional right to remain in the state any longer than it

chose to allow; and the statute would not abridge any right of removal—for, as the case had already been fully removed before the statute was in existence, the right of removal could not be said to have been hindered or abridged by a statute not even in existence.

"Thus it is admitted that a state has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the companies deny is the right of a state to enact in advance that if a company remove a case to a federal court its license shall be revoked.

"We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with domestic companies doing business in Kentucky. No stipulation or agreement being required as a condition for coming to the state, and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into a federal court, your right to further do business within the state shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the Doyle Case, we think is good."

This case has been quoted with approval in a number of subsequent decisions in the supreme court of the United States.

National Council v. State Council, 203 U. S. 163;

Swing v. Weston Lbr. Co., 205 U. S. 278.

It is true that this rule was stated broader by the supreme court than it was necessary to state it, and in subsequent decisions it was found necessary to distinguish or modify it.

In *Western Union Telegraph Company v. State of Kansas*, 216 U. S. 1, a statute of Kansas provided, among other things, that before a corporation of another state should be given authority to do local business in Kansas it should pay to the state treasurer for the benefit of the permanent school fund a charter fee of one-tenth of one percent of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof, or upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one percent, and for each million dollars or major part thereof, over and above the sum of five hundred thousand dollars, two hundred dollars. The Western Union Telegraph Company had a capital stock of one hundred thousand dollars. The fee demanded of it as a condition of its right to do local business in Kansas was twenty thousand dollars. The state brought suit in one of its own courts against the company and sought a decree ousting and restraining the company from doing any local business in that state. The court gave the relief asked for, but the supreme court of the United States reversed the decision. It was held that this was a tax and a burden upon interstate commerce and the court could not give relief without giving

effect to a condition that was in violation of the federal constitution.

The same question was before the court in the case of *Pullman Co. v. Kansas*, 216 U. S. 56. An attempt was made to tax interstate commerce by exacting the payment of a tax as a condition precedent to the right of the corporation to do intrastate business. The court held that this could not be done; that interstate commerce could not be taxed by the state, either directly or indirectly; and that, as there is a special provision in the United States constitution delegating the regulation of such commerce to the United States, the state has no right to subject such commerce to any burdens whatever.

In the case of *Ludwig v. Western Union Telegraph Company*, 216 U. S. 146, the secretary of state was enjoined from revoking the license of the company, on the ground that the company had not paid the tax that was levied on interstate commerce as a condition precedent to continuing to do local business in the state.

In the case of *Southern Railway Company v. Green*, 216 U. S. 400, it was decided that, whatever power a state may have to exclude or determine the terms of admission of foreign corporations not already within its borders, it cannot subject a foreign corporation, already within the state in compliance with its laws and which has acquired property of a fixed permanent nature, to a new and additional franchise tax for the privilege of doing business

which is not imposed upon domestic corporations; that this would be an unconstitutional denial of equal protection of the law, under the Fourteenth Amendment.

The learned counsel for the complainant in the instant case are placing great weight upon the case of *Herndon v. Chicago, Rock Island & Pacific Ry. Co.*, 118 U. S. 135, in which the secretary of state of Missouri was restrained from revoking the license of the defendant in that action for the reason that it had removed a case from the state court to the federal court. In that case, however, it appears that the statute in question was placing upon interstate commerce an unnecessary burden which was declared unlawful and in violation of the constitution of the United States.

It must be borne in mind that the statute in the State of Missouri prohibited the foreign corporations from instituting any suit or proceeding against any citizen of the state in any federal court and from removing, without the consent of the other party in writing, any suit or proceeding brought by or against it in any court of the said state. It was apparent in this case that the legislation was discriminatory against foreign corporations. The defendant could not institute or bring suit in any federal court against any citizen of that state, nor any proceeding whatever. It was ousting the federal courts of jurisdiction of all cases in which citizens of the state might be a party. Not only actions or proceedings that

were found upon causes originating in the state, but all suits and all proceedings were prohibited from being taken to the United States court. The prohibition was not limited to suits and proceedings in the district or circuit courts, but it included those in the supreme court. It was very evident that this was discriminatory. It even took away the right to have the federal court pass on a federal question. The statute in the State of Wisconsin has no resemblance to such a law. It was very evident that the Missouri act was not passed for the purpose of putting foreign corporations on an equal footing with the corporations of the state.

Great stress is also laid upon the case of the *Western Union Telegraph Company v. Julian*, 169 Fed. 166. It will be observed, however, that the statute in that case, requiring the forfeiture of the license of the foreign corporation for removing a case to the federal court or instituting a case or proceeding in the federal court, was unconstitutional by reason of the following provision in the constitution of Alabama:

> "All corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."

The court held that the statute in question was void as violative of the said provision of the state constitution. It follows that it was not necessary in that case to decide whether that statute is in violation of the constitution

of the United States because it was a void statute, and everything said on that point in said case was *obiter dicta*. This case was not passed upon by this court. Later cases cited by counsel we contend are not in point.

In the case of *Harrison v. St. L. & San Francisco R. R. Co.*, 232 U. S. 318, this court held that a state cannot destroy the right to remove causes to the federal court by imposing arbitrary conditions as to state citizenship which render it impossible for one entitled to the right to avail of it. This somewhat unique and complicated statute of the State of Oklahoma was declared unconstitutional and the *Doyle* and *Prewitt Cases* were distinguished, and it was said that the rule in those cases had an extremely narrow scope.

Having reviewed the decisions of the court, we now come to a consideration of the present status of the rule as laid down in the *Doyle* and *Prewitt Cases* and as distinguished and modified by subsequent cases. It must be borne in mind that in none of these subsequent cases has this court expressly overruled the doctrine announced in said cases. In making practical application of the principle to different cases as they arose from time to time and in construing certain statutes somewhat similar to those in the said cases, this court has found it necessary to greatly diminish the scope in which said rule is now held operative.

This court has intimated that this rule has a very narrow application at the present time and is probably only applicable to insurance

cases. It must be remembered, however, that in the *Doyle* and *Prewitt Cases* the rule was laid down in general terms as applicable to all foreign corporations and not limited to insurance corporations. We believe we have shown in this brief that the reasons for a law of this nature are just as potent and necessary against foreign corporations doing an interstate business in the state as they are against foreign corporations doing an insurance business. This law attempts to place a foreign corporation doing an interstate business on an equal footing with a domestic corporation which also is doing an interstate business. When both corporations are engaged in intrastate business, the domestic corporation, although it is engaged in interstate business, has not the right to remove to the federal court cases started against it by citizens of this state, where the cause of action arises within the state, unless a federal question is involved.

A foreign corporation doing an interstate business, which is also licensed to do intrastate business in this state, can therefore transact like business under more favorable conditions than a domestic corporation. They are not on an equal footing. This statute places them on a substantially equal basis.

In the later cases above referred to, the rule that a state cannot attach unconstitutional conditions to a license given to a foreign commercial corporation to do interstate business within its borders has been given a new sanc-

tion. And in this connection it is well to state that the right to remove a case to the federal court by a foreign insurance company is just as sacredly guarded by the constitution and statutes of the United States as it is for any other corporation. These guaranties apply to all foreign corporations including insurance as well as others. Other constitutional guaranties are equally applicable to foreign insurance companies.

We believe that, if at the present time the State of Wisconsin should enact a law requiring a foreign insurance corporation, duly licensed to do business in Wisconsin, to pay an unconstitutional and discriminatory tax as a condition for continuing to do business in the state, and requiring the secretary of state to revoke the license if such tax were not paid, this court would find it necessary to declare such statute unconstitutional on the authority of the recent cases modifying the rule in the *Doyle* and *Prewitt Cases*. It may well be argued that, if the state has a right to make one condition which is violative of the United States constitution, it may impose other conditions that are also violative of the constitution.

As was well said in the dissenting opinion of Justice Day in the *Prewitt Case*, at page 267:

> "If the State may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this

case, that the right of the state to exclude, includes the right, when exercised for any reason or for no reason, the state may say to the foreign corporation,—You may do business within this State, provided you will yield all right to be protected against deprivation of property without due process of law; or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws; and so on through the category of rights secured by the Constitution and deemed essential to the protection of people and corporations living under our institutions."

It is our contention that there are two distinct provisions of the constitution of the United States involved in this question instead of one, one provision being as follows:

"This constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.

"The judicial power of the United States * * * shall extend to * * controversies between citizens of different states."

And the second being the provision contained in the Fourteenth Amendment to the United States constitution that no state shall pass any law denying to any person the equal protection of the law.

We have shown heretofore in this brief, we believe, that the statute in question in the instant case is necessary for the purpose of placing a foreign and a domestic corporation doing intrastate business in Wisconsin on an equal basis. We know of no way in which that can be done other than by a statute like the one here in question, or very similar thereto. The mandates of the Fourteenth Amendment that no state shall pass any law denying to any person within its borders the equal protection of the law is violated if the state passes laws permitting foreign corporations to come within its borders and compete with domestic corporations in intrastate business on an unequal basis. We therefore contend that the Fourteenth Amendment authorizes the enactment of a statute that has the effect of placing the two corporations on an equal basis and that the rule laid down in the *Doyle* and *Prewitt Cases* should be, therefore, modified to the extent that the condition attached must not be violative of any provision of the constitution of the United States unless authority is found for its enactment in some other provision of the constitution of the United States. The two provisions of the constitution applicable to the law under consideration are in *pari materia* and must be considered together. We contend that if so considered and applied to this Wisconsin statute the same may be upheld as constitutional and as being an exception to the rule that no condition can be attached to the

license of a foreign corporation to do interstate business which is violative of a certain provision of the constitution of the United States, and the exception being predicated upon the peremptory requirements of the Fourteenth Amendment.

It is our insistence that the supreme court of the United States should not hold that a state may not revoke the license of a foreign corporation, authorizing it to do intrastate business in this state simply because such corporation is also doing an interstate business or doing business as an agent of the federal government. It is true that in a number of the decisions from which quotations were made by the learned counsel for the complainant emphasis was laid upon the fact that interstate commerce was interfered with and that the state had no right to interfere with such commerce. This was true simply because the cases under consideration were cases in which the state tried to interfere with interstate commerce.

We believe that the language of Chief Justice Marshall in the case of *Cohens v. State of Virginia*, 6 Wheaton, 399, is here apropos:

> "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The

reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The specific provision of the statute here in question and other similar statutes that have the same effect, and are passed for the purpose of placing foreign corporations on substantially an equal basis, might well be sustained by this court under the provisions of the Fourteenth Amendment and under the well determined right of a state to exclude a corporation doing intrastate business within its borders. We fear that an adverse decision by this court will have an injurious effect upon the business of the country, and will hamper the arm of the state in protecting the rights of its citizens. Such a ruling would have the effect of making it impossible for the state to place foreign and domestic corporations on an equal footing within the state, and corporations would not organize hereafter in states where they intend to do a local business. They would organize in other states in which they do not intend to do such business and enter those states in which they desire to do business as a foreign corporation. It will thus take away from the state its visitorial powers and effectually curb the state in the enactment of laws designed for the protection of its own citizens.

So-called "tramp" corporations will be organized throughout the country, for they can successfully defy the states in which they operate as foreign corporations.

VI.

A Foreign Corporation is not Required by the Statutes of Wisconsin, as a Condition for Receiving a License in the State of Wisconsin, to Stipulate that it Will not Remove a Case to the Federal Court.

It was held by the trial court that the provision in par. (f), subsec. 7, sec. 1770*b*, to the effect that such corporation by its president, secretary or general manager shall make and forward to the secretary of state, with the articles of incorporation above provided for, a statement duly sworn to "that such corporation, as a condition of its being permitted to begin or continue doing business within the state, shall comply with all the laws of the state with regard to foreign corporations" and a similar provision in par. (h), subsec. 3, is the equivalent to the requirement of a stipulation or agreement by a foreign corporation that it will not remove a case to the federal court.

The case of *Barron v. Burnside*, 121 U. S. 186, is relied upon, in which the statute required that the application for the permit should contain "a stipulation that said permit

shall be subject to each of the provisions of the act."

That statute also contained a similar provision to the one contained in our statute as to the forfeiture of the permit in case corporations should remove a case to the federal court. It will be observed that in that case it is expressly stipulated that the permit granted should be subject to the provisions of the act; that it should be forfeited if the corporation removed a case to the federal court. This was construed by the court as a stipulation that the corporation would not remove a case to the federal court. Our statute does not use the same or similar language. The statute here provides that the corporation shall state in a sworn statement that it will comply with all the laws of the state with regard to foreign corporations. The same statute makes specific provision of affirmative acts that the corporation is required to do as a condition for doing business in the State of Wisconsin. It must file its articles of incorporation together with a certain statement with the secretary of state; it must file annually a report of its business; it must pay a certain specified fee upon the filing of its articles of incorporation; it is required to pay a certain specified fee upon the amendment of its articles; it is prohibited from entering into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or com-

modity in general use in the state under sec. 1770*g* of the statutes.

We contend that it is these positive requirements that the corporation is promising to comply with and that it is not the intention of this statute to exact from it a promise that it will not remove any case to the federal court. This is apparent from the fact that this statute does not contain an express provision forbidding the foreign corporation from removing a case to the federal court, and a similar provision to that of this act requiring the forfeiture of the articles when a case is removed was construed by the court in the *Doyle Case* as leaving it optional with the foreign corporation whether it would or would not remove the case. It thus appears that the foreign corporation may comply with this law when it removes the case as well as when it does not remove the case. It is given the option to remove it or to refrain from removing it. If it removes the case it is still within its rights under the statute and is complying with the law. If it does not remove the case it is also complying with the law.

We contend that this provision of the statute has been given a very strained construction by the trial court and that it does not bear such construction. It is held by the trial court that the statute so construed makes this, as well as the provision of sec. 1770*f*, unconstitutional.

It is a cardinal rule of construction that when a statute is susceptible of two construc-

tions, one of which supports the act and gives it effect and the other renders it unconstitutional and void, the former will be adopted even though the latter will be the more natural interpretation of the language used.

United States v. Coombs, 12 Peters, 75;
United States v. Central Pacific Ry. Co., 118 U. S. 235;
Missouri v. Kansas City, etc. Ry. Co., 32 Fed. 722;
Granada County v. Brogden, 112 U. S. 261;
Singer Mfg. Co. v. McCollock, 24 Fed. 667;
Bigelow v. West. Wis. R. Co., 27 Wis. 478;
Palms v. Shawano County, 61 Wis. 211;
Johns v. Milwaukee, 88 Wis. 389.

The statement in the affidavit by the foreign corporation to be filed with the secretary of state containing a promise that the corporation will comply with the laws of the State of Wisconsin as to foreign corporations was held by the trial court to be a stipulation not to remove, and, therefore, necessarily void. It is our contention that this should be construed as requiring the corporation to do something which is legal and not to do something which is illegal or void. A construction that this is equivalent to stipulating that they will not remove a case to the federal court is a construction that the law requires it to do an illegal act. Such a construction is absurd.

We have already directed the court's attention to the fact that in the *Doyle Case* the law was upheld, although the stipulation which was declared unconstitutional in the *Morse Case* was a part of the same statute enacted by the legislature of Wisconsin. The part of the statute which requires the stipulation of the insurance companies, as passed upon in the *Morse Case*, is still a part of the insurance laws of the State of Wisconsin.

In subsec. 2, sec. 1915 it is provided:

> "Any such company or other insurer shall first file a written instrument, duly signed by the president and secretary thereof, with the corporate seal affixed, declaring that it desires to transact the business of insurance in this state and that it will accept a license therefor according to the laws of this state, *which shall cease and terminate in case such corporation shall remove into any court of the United States any action or proceeding commenced in any court of this state upon a claim or cause of action arising out of any business or transaction done therein, or in case it shall violate or fail to comply with any provision of law applicable to such corporation*, or in case its capital shall be impaired to the extent of twenty per cent. and shall not be made good within such time as the commissioner of insurance shall require, if such commissioner shall, in either case, declare its license revoked therefor." (Italics ours.)

It will be observed in that part of the subsection which is in italics two specific promises are made. One is that such corpora-

tion "shall cease and terminate" in case it "shall remove into any court of the United States any action or proceeding commenced in any court of this state upon a claim or cause of action arising out of any business or transaction done therein." The second is an agreement that it "shall cease and terminate" "in case it shall violate or fail to comply with any provision of law applicable to such corporation."

Evidently the lawmakers did not consider the first part of the stipulation as contained in the second, and it was necessary to expressly stipulate that it would not remove the case, in addition to the stipulation that it would not violate or fail to comply with the insurance laws. When, subsequently, the lawmakers enacted the statute concerning foreign corporations other than insurance corporations, they left out the stipulation that the corporation would not remove the case to the federal court and only required in the statement to be filed with the secretary of state's office a promise to comply with all the laws of the state with regard to foreign corporations.

In this connection we would call the court's attention to the provisions of subsec. 11, sec. 1770*b*, as follows:

> "The failure to comply with any of the provisions of this section shall, for such violation, subject the corporation or any agent, officer or person acting for it in this state, to a penalty of five hundred dollars, to be sued for and recovered in the name of the

state with the costs of prosecution, by the attorney-general or by the district attorney of any county in which it or any of its agents or officers shall be located, or reside, or transact or attempt to transact any business."

Here the word "comply" is also used in the first line and it must be given a consistent meaning in both cases.

Under this section a forfeiture could be recovered against a corporation only in case it violated any of the express requirements of the statute. No forfeiture could be recovered against the corporation for removing the case to the federal court. The corporation has the option to take its cases to the federal court and have its license revoked, or it may desist from taking its cases to the federal court and retain its license. The words, "failure to comply with any of the provisions of the section," must be given a strict construction against the state, and so the same words used in the same section requiring the statement to be filed with the secretary of state, containing a promise that the corporation "shall comply with all the laws of the state with regard to foreign corporations," must be construed in the same way. No stipulation not to remove a case was contemplated. This is the construction placed upon it by the administrative officers of the state.

Like words and expressions in the same section of the statutes should certainly be given the same meaning.

Sutherland, Stat. Const., 255;
28 Am. & Eng. Ency. of Law, (2d ed.) 610.

We, therefore, find proof within the statutes of the state that a promise to comply with all the laws concerning foreign corporations does not include within it a promise not to remove the case to the federal court. Had the lawmakers intended the provision here in question as a stipulation not to remove a case to the federal court, they certainly would have inserted such provision in this statute in the same way as it is found in sec. 1775 (subsec. 2). That they left it out shows that they did not intend to require such a stipulation. No such construction has ever been placed upon said statute by the administrative officers of the state; no statement filed in the office of the secretary of state contains a stipulation, in express terms, that a foreign insurance company will not remove a case to the federal court.

Even though this should be considered a stipulation, we contend that it should not be considered as invalidating other provisions of our foreign corporation laws. The provision for the cancelling of the license on removal of a case to the federal court by the foreign insurance company in the Wisconsin statute was upheld in the *Doyle Case* in spite of the fact that the same statute con-

tained a stipulation, which stipulation was declared void and of no effect in the *Morse Case*. So this statute in question, as to the cancellation of the license of a foreign corporation upon the removal of a case to the federal court, must be held as not being affected in any way by the statement filed in the secretary of state's office. If the statement is void, that does not make the other provision of the statute void. If the provision requiring the stipulation in the statute is inseparable from that part of the statute which requires the cancellation of the license upon the removal of a case to the federal court, as was held in the case of *Barron v. Burnside*, then the other provision of our foreign corporation laws authorizing the secretary of state to grant a license to a foreign corporation is also void. The words of Chief Justice Ryan in the case of *State ex rel. Drake v. Doyle*, 40 Wis. 198, speaking on a similar contention concerning the laws relating to foreign insurance companies, in which the stipulation had been declared unconstitutional in the *Morse Case*, and where it was contended that the whole law was also void, are here pertinent:

> "It is a settled doctrine of this court that, if it be unconstitutional, the whole statute authorizing licenses to foreign insurance companies is unconstitutional. *Slauson v. Racine*, 13 Wis. 398; *Lynch v. The Economy*, 27 Wis. 69; *State v. Dousman*, 28 Wis. 541. In that view of the statute no license to foreign insurance companies would be au-

thorized by law. The secretary of state would have acted without color of authority in issuing the license in question. The license would give no color of right to insurance companies to do business within the state."

We contend that the position that the law in question is unconstitutional is inconsistent with the position that the defendant is entitled to the benefits derived from the license. If this law is unconstitutional, then, under the construction placed upon similar statutes by the supreme court of the State of Wisconsin, the whole law is unconstitutional, including that part authorizing a license to be given to a foreign corporation.

We contend that the complainant in this case has no right to contend that the statute in question is unconstitutional, while at the same time retaining the benefits that it received by reason of a license having been issued it by virtue of said law.

Furguson v. Landrum, 5 Bush. (Ky.) 230, 196 Am. Dec. 350;
Daniels v. Tearney, 102 U. S. 421.

The scope and meaning of the law as interpreted by the higher court of the state should have great weight with this court in passing upon this question.

VII.

A Stipulation Required to be Filed in the Secretary of State's Office by a Foreign Corporation that it Will not Remove a Case to the Federal Court Does not in any Way Change the Effect of a Statute of this Nature.

In the dissenting opinion in the *Prewitt Case*, Justice Day, at page 268, used the following language:

> "Furthermore it is stated in the prevailing opinion that, while the state may exclude in advance or deprive a foreign corporation of the privilege of doing business after it is lawfully in the state because of the exercise of a federal right, it cannot require the corporation to agree in advance that it will waive such right, as that, it is admitted, would be unconstitutional. We think the distinction is without a substantial difference and makes the validity of the act turn upon the means of attaining the same unlawful end. In either alternative the corporation is excluded from the state because it will not consent to surrender the right given it under the federal constitution."

We agree with this to the extent that there is no substantial difference in the effect of the law as to whether a stipulation is or is not given to remove a case. The effect of the statute in either case is to induce the corpora-

tion to waive its right to remove a case to the federal court when it is doing an intrastate business within the borders of the state. We hope that this question will not turn upon as narrow a point as the giving of a stipulation. We contend that there was no intention by the lawmakers of the state to require a stipulation not to remove a case, and to hold that the provision here under consideration is, in effect, a stipulation not to remove a case; and then to hold that, because of that stipulation so required, the rest of the law is void and unconstitutional is, in our opinion, looking to the form instead of the substance of things. We hope that this court will pass upon the real merits of this question before it and will express itself in such clear language that the State of Wisconsin, as well as other states, may have definite knowledge as to whether a state may pass a law of this nature which has for its purpose and necessary effect the placing of a foreign corporation on substantially an equal basis with a domestic corporation.

VIII.

The Wisconsin Statutes Relating to Foreign ~~Insurance~~ Companies do not in any way Interfere with or Affect Interstate Commerce.

The scope and meaning of a state statute, as determined by the highest court of the state,

concludes this court in determining whether or not said statute violates the federal constitution.

Smiley v. Kansas, 196 U. S. 447;
Nat. Cotton Oil Co. v. Tex., 197 U. S. 115;
Tampa Waterworks Co. v. Tampa, 199 U. S. 241;
Horn Silver Mining Co. v. State of N. Y., 143 U. S. 305;
Ducat v. Chicago, 10 Wall. 410;
Paul v. Virginia, 8 Wall. 168.

This statute of Wisconsin relating to foreign corporations has been before the supreme court of the State of Wisconsin a number of times and was applied to a variety of conditions and its general validity sustained.

Ashland L. Co. v. Detroit S. Co., 114 Wis. 66;
Beaser v. Barber A. P. Co., 120 Wis. 599;
Chicago T. & T. Co. v. Bashford, 120 Wis. 281;
Greek-American S. Co. v. Richardson D. Co., 124 Wis. 469;
Pres. M. Fund v. Thomas, 126 Wis. 281;
Allen v. Milwaukee, 128 Wis. 678;
Chickering-Chase Bros. Co. v. White, 127 Wis. 83;
Catlin & Powell Co. v. Schuppert, 130 Wis. 642;
Elwell v. Adder Machine Co., 136 Wis. 82.

At page 88 of the last case Judge Timlin, speaking for the court, said:

"There must be read into the foregoing statutes, where they forbid the transaction of business in this state and the acquisition, holding, and disposal of property in this state, an exception of such business as constitutes interstate commerce and an exception of such property as is acquired, held or disposed of in this state in carrying on interstate commerce. Also, where every contract is declared to be void, we must except from that provision such contracts as relate to interstate commerce." Citing *Loverin & B. Co. v. Travis*, 135 Wis. 322, 115 N. W. 829; *Catlin & P. Co. v. Schuppert*, 130 Wis. 642, 110 N. W. 818; *Greek-Am. S. Co. v. Richardson D. Co.*, 124 Wis. 469, 102 N. W. 888.

The revocation of the license in question will therefore not interfere in any way with the right of the corporation to transact interstate commerce in the State of Wisconsin, for that right is not dependent upon a license from the state; neither is any corporation transacting business as the agent of the federal government required to have a license to do intrastate business in order to transact the business delegated to it by the federal government. The revocation of the license cannot in any way remove the right to transact such business and will therefore not deprive the corporation of doing business in the State of Wisconsin for which no license is required under the Wisconsin statutes.

IX.

The Revocation of the License of the Respondent Does not Deprive it of any Constitutional Rights.

The respondent has argued that a revocation of its license would deprive it of property without due process of law or would impair the obligation of contracts and property rights acquired in the state. This point, however, the trial court has not passed upon, and it is our contention that it is not well taken.

Under sec. 1, art. XI of the constitution of Wisconsin it is provided that all general laws or special acts enacted under the provisions of said section (relating to corporations) may be altered or repealed by the legislature at any time after their passage. Under this provision the supreme court has decided that all special acts of incorporation are subject to modification or repeal.

Pratt v. Brown, 3 Wis. 603;
Madison, etc. Plank Road Co. v. Reynolds, 3 Wis. 287;
Blair v. Milw. etc. Ry. Co., 20 Wis. 254;
State v. Milw. Gaslight Co., 29 Wis. 454.

In the case of *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, it was held that a power reserved to the legislature to alter, amend or repeal a charter authorized it to make any alteration or amendment of a charter granted

subject to that power, which would not defeat or substantially impair the object of the grant or any rights vested under it and which the legislature might deem necessary to secure either that object or any public right.

A corporation organized in this state that has acquired property has a vested interest in said property and when such corporation is dissolved by act of the legislature the property will go to the stockholders of the corporation and they may use and hold the property as any other person in the state.

In order to place foreign corporations doing a local business in the State of Wisconsin upon the same basis the legislature may at any time pass a law revoking the license of a foreign corporation or prescribing a condition under which a foreign corporation may continue to do business in the state. This is all that was provided by the statute in question.

It cannot be argued that, because a foreign corporation has acquired vested interests in the State of Wisconsin, the state is, for that reason, powerless to annul its license. The vested interests will not be interfered with under this statute.

Our supreme court has held, in the case of *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281, that the provision of section 1770*b* that a corporation while in default shall not "transact business or acquire, hold or dispose of property in this state" and that every contract made by it or in its behalf affecting its personal liability or relating to property within the

state shall be wholly void on its behalf, is to be construed as applying to prospective contracts and transactions only. At page 285 the court said:

> "We can feel no doubt that the legislation of 1897 was prospective only. That is the presumptive purpose in all enactments except some merely remedial statutes, unless the contrary clearly appears. *State v. Atwood*, 11 Wis. 422; *Seamans v. Carter*, 15 Wis. 584; *Finney v. Ackerman*, 21 Wis. 268; *Vanderpool v. L. C. & M. R. Co.*, 44 Wis. 652, 663; *Jochem v. Dutcher*, 104 Wis. 611, 614, 80 N. W. 949. Especially strong is that presumption in the present case, when the avoiding of an existing contract or the divesting of a vested right of property would be so clearly obnoxious to the constitutional prohibition against the impairment of the obligation of contracts (sec. 12, art. I, Const. Wis.; sec. 10, art. I, Const. U. S.), and against the deprivation of any person of property without due process of law (art. XIV, Amendment Const. U. S.)."

At page 286 the court further said:

> "So there remains of the acts prohibited by section 1770b only the holding of property in this state, if, indeed, the trustee holds property, instead of a mere lien thereon, having *situs*, not in Wisconsin, but at the domicile of the holder. *State ex rel. Dwinnell v. Gaylord*, 73 Wis. 316, 41 N. W. 521. From what has been said already, our conclusion must be obvious that the statute was not intended to apply to the acquisition of any property prior to its enactment, nor to the

holding of any so acquired, so long as the prohibition against transacting business in this state be not breached. That one, even a foreign corporation, owning property the day before the enactment of section 1770*b*, ceased to own or hold it upon the enactment of that statute, is a result which no legislature had any right to intend, nor have courts any right to impute such an intent. The absurdity of such a construction is emphasized by the accompanying prohibition against disposing of any such property. If the legislature intended to forbid the holding of previously acquired property, they equally forbade its disposal. Hence no foreign corporation owning property in this state when section 1770*b* took effect could escape criminality save upon the theory that the statute, *ex proprio vigore*, confiscated the property, so that its former owner had ceased to be such without having disposed of it. Clearly such confiscation would be obnoxious to the fourteenth amendment to the federal constitution, forbidding any state to deprive any person of property without due process of law. The only reasonable construction of this portion of the statute is that the prohibitions against holding or disposing of property must be taken as associated with that against acquiring any, so that they apply only to property attempted to be acquired after the statute, and therefore in its defiance. The question how far full enjoyment of previously acquired property so continued to be held by a foreign corporation may be affected by restraint on the doing of business or the making of contracts does not arise in the present case, since none of these prohibited acts appear to have been attempted

by plaintiffs. The consideration of that question may properly wait till it arises."

See also *Coé v. Rothman*, 126 Wis. 515.

It thus appears that the vested interests of foreign corporations are protected under the statute in question and the decisions of the supreme court of the State of Wisconsin. The revocation by the secretary of state of the license of the complainant in this case will not interfere with the vested interests of that corporation. So far as the property acquired and contracts made are necessary for the transaction of interstate business, they are not to be anticipated by a revocation of the license, because, under the decision of *Elwell v. Adder Machine Co.*, 136 Wis. 82, the act does not apply to interstate commerce. Neither will such vested rights be affected if the property was acquired and the contracts made in the transaction of local business prior to the revocation of the license, for the reason that such contracts are declared to be valid after the license has been revoked.

Should this court hold that the license of the complainant cannot be revoked and that the state is powerless to expel it from the state, so far as the transaction of future local business is concerned, then the complainant will have far greater powers in this state than it would have were it organized under the laws of the State of Wisconsin. The state would be powerless to revoke its privilege of doing busi-

ness within the state, while, if it were a domestic corporation, the corporate powers could be taken away at any time, under the reserve power vested in the legislature.

At this time we desire to call the attention of the court to the following provisions of sec. 1768:

> "The legislature may at any time limit or restrict the powers of any corporation organized under any law and for just cause annul the same and prescribe such mode as may be necessary for the settlement of its affairs."

If the power to revoke the license of a domestic corporation may be exercised in a case where a domestic corporation is engaged in interstate commerce, then how can it be said that a cancellation of the license of a foreign corporation to do intrastate business interferes with interstate commerce. In the former case, it would be more of an interference than in the latter. There is no question but that the state can revoke the license of a domestic corporation even though it is engaged in interstate commerce.

See *Louisville & Nashville Ry. Co. v. Kentucky*, 183 U. S. 503.

As the Wisconsin law is interpreted by the supreme court, and administered by the officers of the state, it is limited in its scope to intrastate business and it cannot be held void under the commerce clause of the federal constitution, unless this court is prepared to

go to the length of holding that a state altogether loses the right to exclude or regulate any foreign corporation whenever a part of its business is interstate commerce. The reserve right of the state to control the purely domestic business is as sacred and is to be as jealously guarded as the granted right of Congress to regulate its interstate business. It can with no more reason be held that the power of the state is lost because of the difficulty of severing the two kinds of commerce than it can be said that the power of Congress is lost for the same reason. The difficulty is one of administration and not of power.

> *Chicago R. R. Co. v. Cutts*, 94 U. S. 155; *Osborne v. Florida*, 164 U. S. 650.

We cannot agree that the necessary effect of enforcing the revocation of its license against a foreign corporation which has acquired property rights in the state and made contracts, is to deprive it of property without due process of law. In reply to a similar argument presented to the consideration of this court in *United States v. Delaware Railway Co.*, 213 U. S. 366, the court said:

> "In the form of statement these contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause interpreted as the Government construed it. For the purposes of our consideration of the

subject it may be considered as insisted in behalf of the United States that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation."

See also *Newport & Cincinnati Bridge Company v. United States*, 105 U. S. 470.

The position of counsel is that a corporation admitted into a state by its comity can transfer such comity into a perpetual right by the mere extent or nature of its investments. Constitutional limits upon the powers of the state do not have regard to the degrees of transgression. If a state cannot terminate the license of a foreign corporation to do business in the state for any declared and recognized grounds of forfeiture because the consequences to the corporation will be disastrous, then it is also true that it cannot forfeit the charter of any corporation whatever, since every forfeiture must be attained with similar loss. Certainly the powers of the state as to the right to exclude or control foreign corporations cannot be measured solely by the volume of the business and the nature and amount of the investments.

SUMMARY.

We have shown that:

It is the policy of the State of Wisconsin to treat foreign and domestic corporations equally. No discriminatory laws have been

enacted or enforced in the State of Wisconsin against foreign corporations, and the state has scrupulously endeavored to place foreign corporations on an equal footing with domestic corporations.

Section 1770*f* was enacted for the purpose of carrying out this policy, and it has the purpose and the effect of putting the two classes of corporations on an equal basis.

Without this law or one similar thereto, a foreign corporation would have greater powers in the state than a domestic corporation. It would be able to circumvent every statute enacted by the state for the protection of its citizens, concerning court procedure, by removing every case originating in the state, brought by a citizen of the state against such corporation, to the federal court. A foreign corporation would be in a position to prevent the citizens of the state exercising their remedial rights enacted by the state against corporations.

Experience has shown that foreign corporations have the power to harass the citizens of the state doing business with them by removing actions, brought against them for the purpose of enforcing remedial rights of the citizens, from courts created by the state to distant tribunals and thereby causing inconvenience and expense.

The provision of the Fourteenth Amendment to the constitution of the United States, that no state shall make or enforce any law which shall deny to any person within its

jurisdiction the equal protection of the law, is applicable to remedial rights. This amendment requires that all persons, including domestic and foreign corporations, shall have like access to the courts of the country for the protection of their persons and property, the redress of wrongs and the enforcements of contracts.

When a foreign corporation is within the state doing an intrastate business, it is a person within the contemplation of the Fourteenth Amendment and can not be placed in a separate class from domestic corporations, but all corporation laws of the state must be equally applicable to both.

The rule of comity goes only so far as to place foreign corporations on an equal basis with domestic corporations, but never beyond. This court has held that it does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation. The unanimous holding of the authorities is to that effect.

The rule of the *Doyle* and *Prewitt Cases*, properly qualified and limited in its scope, is applicable to this statute and is sufficient to sustain its constitutionality.

The condition attached to the license of the respondent to do intrastate bsuiness in the State of Wisconsin is constitutional for the reason that it is the only way in which foreign and domestic corporations can be placed upon an equality in the state, and is, therefore, authorized by the Fourteenth Amendment.

The right of a foreign insurance company to remove its cases to the federal court is just as sacredly guarded by the constitution and statutes of the United States as the right of any other corporation to do so, and the need of a law of this kind is as great in the case of a foreign corporation doing intrastate business and interstate business in this state as it is for a foreign insurance corporation.

A foreign corporation is not required by the statutes of Wisconsin, as a condition for receiving a license in the State of Wisconsin, to stipulate that it will not remove a case to the federal court.

The Wisconsin statutes relating to foreign corporations do not in any way interfere with or affect interstate commerce.

The revocation of the license of the respondent does not deprive it of any constitutional right.

Without this statute or one similar thereto, a foreign corporation would have greater powers in the state than a domestic corporation and this would induce corporations to organize in states where they do not intend to transact business, and thus greatly increase the number of "tramp" corporations.

We therefore respectfully submit that the act of the legislature of the State of Wisconsin here under consideration is constitutional and a necessary enactment to prevent foreign

corporations from exercising greater powers in the State of Wisconsin than domestic corporations.

Respectfully submitted,

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Assistant Attorney General,
Attorneys for Appellants.

APPENDIX

LAWS OF WISCONSIN RELATING TO FOREIGN CORPORATIONS

Section 1770b, as amended by Ch. 351, 1899; Ch. 399, 1901; Ch. 434, 1901; Ch. 506, 1905; Ch. 562, 1907; Ch. 142, Ch. 214, 1911; Chs. 212 and 248, 1913.

Corporation defined. Section 1770*b*. 1. For the purposes of this section, the term "corporation" shall include all corporations, associations, companies, joint stock companies, or express companies organized otherwise than under the laws of this state.

Articles; filing with secretary of state. 2. No corporation incorporated or organized otherwise than under the laws of this state, except railroad corporations, corporations, or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, **shall transact business or acquire, hold or dispose of property in this state until such corporation shall have caused to be filed in the office of the secretary of state a copy of its charter, articles of association or incorporation and all amendments thereto duly certified by the secretary of state of the state wherein the corporation was organized.** In case the laws of the state wherein the corporation was organized do not require that the charter, articles of association or incorporation be filed in the office of the secretary of state, then said charter, articles of association or incorporation shall be certified to by the register of deeds or other officer with whom said articles of association or incorporation were filed with a certificate of the secretary

of state attached, certifying that said officer is the proper officer to certify to said articles of association or incorporation. Mortgages or trust deeds taken by foreign corporations after the twenty-sixth day of May, 1911, and prior to January 1, 1914, to secure the payment of money heretofore or hereafter loaned or advanced pursuant to such mortgages or deeds of trust, are hereby declared valid. But no trust deed given as security upon property in this state, if otherwise valid, shall be void merely because the trustee named therein shall be a foreign corporation which is not licensed to do business in this state.

Statement to be filed with articles; contents. 3. Such corporation, by its president, secretary, treasurer or general manager, shall make and forward to the secretary of state, with the articles of association or incorporation above provided for, a statement duly sworn to, stating:

a. The name of such corporation and the location of its principal office or place of business without this state, and, in case said corporation is to have any place of business or principal office within this state, the location thereof.

b. The names and addresses of the officers of said corporation, and the name and address of the agent or manager of said corporation who may represent said corporation in this state.

c. The amount of the capital stock paid in money, property or services.

d. The nature of the business to be transacted in this state.

e. The proportion of the capital stock of said corporation which is represented in this state by its property located or to be acquired therein and by its business to be transacted therein. In determining said proportion of the capital stock, the property of said corporation located in this state or to be acquired therein and the business transacted within and without the state for one year immediately preceding the filing of its charter or articles of association or incorporation shall be considered and control.

f. Shall constitute and appoint the secretary of state its true and lawful attorney upon whom the summons, notices, pleadings or process in any action or proceeding against it may be served in respect

to any liability arising out of any business, contract or transaction in this state, and stipulate that service thereof upon the secretary of state, or his assistant, shall be accepted irrevocably as a valid service upon it, and that such appointment and stipulation shall continue in force irrevocably so long as any liability of such corporation remains outstanding in this state.

g. When such corporation was authorized to do business in the state wherein incorporated and whether now so authorized.

h. That such corporation as a condition of its being permitted to begin or continue doing business within this state, shall comply with all the laws of the state with regard to foreign corporations.

Fee for filing. 4. Such corporation shall pay into the office of the secretary of state, upon filing its articles of association or incorporation, a fee of twenty-five dollars, and one dollar for every one thousand dollars of its capital stock exceeding twenty-five thousand dollars employed or to be employed in this state, as shown by its sworn statement.

Amendments; fee; penalty. 5. All amendments to the articles of association or incorporation made subsequent to the first filing with the secretary of state shall be certified to and filed in the same manner as the articles of association or incorporation, and shall be so filed within thirty days after the same have been filed with the secretary of state or other proper officer of the state wherein the corporation is organized. For filing such amendment the corporation shall pay to the secretary of state a fee of ten dollars except in case of amendment increasing capital stock, in which case the fee for filing shall be in addition to ten dollars, one dollar for each additional one thousand dollars of the increased capital stock to be used in this state, as shown by a sworn statement to be filed with the amendment increasing the capital stock, which said statement shall be signed by the president, secretary, treasurer or general manager of the corporation, and shall state the proportion of the increased capital stock to be employed in this state. In case of failure to file amendments, as above stated, the corporation shall pay to the secretary of state, on filing said amendment, a penalty of twenty-five dollars.

Officers; filing notice of change; license; revocation. 6. Whenever any change is made in the offices of such corporation, the names and addresses of the officers elected shall be filed with the secretary of state within twenty days after such change. The license of such corporation to do business in this state shall be revoked if it shall remove or make application to remove into any district or circuit court of the United States, any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within this state. (*1905 c. 506.*)

Annual report; contents; date of filing. 7. Every foreign corporation which has heretofore filed with the secretary of state a copy of its charter or articles of association or incorporation or which shall hereafter file the same as required by this act, and every foreign corportion transacting business in this state shall annually, between the first day of January and the first day of March, file with the secretary of state a report sworn to by the president, secretary, treasurer or general manager of the corporation, as of the first day of January, which shall state:

a. The name of such corporation and the location of its principal office or place of business without this state, and its place of business or principal office within this state, if maintained.

b. The names and addresses of the officers of said corporation, and the name and address of the agent or manager who may represent said corporation in this state.

c. The nature of the business transacted in this state during the year preceding.

d. The amount of capital stock paid in money, property or services.

e. The proportion of the capital stock represented in the state of Wisconsin by its property located and business transacted therein during the preceding year. In determining the proportion of capital stock employed in the state, the same shall be computed by taking the gross business in dollars of the corporation in the state and add the same to the full value in dollars of the property of the corporation located in the state. The sum so obtained shall be the numerator of a fraction of which the denominator shall consist of the total gross business in dollars of the corporation, both within and without the state,

added to the full value in dollars of the entire property of the corporation, both within and without the state. The fraction so obtained shall represent the proportion of the capital stock represented within the state. The secretary of state may demand, as a condition precedent to the filing of such report, such further figures, information and statements as he may deem proper in order to determine the accuracy of the reports submitted; the additional information so obtained shall not become a matter of record in the department of state. The corporation shall pay a fee of two dollars for filing such report. In case said report shows that said corporation employs in this state a proportion of its capital stock in excess of twenty-five thousand dollars, said corporation shall pay to the secretary of state, at the time of the filing of said report, an additional fee of one dollar for each one thousand dollars of such excess, except that the said corporation shall receive a credit for the proportion of its capital stock already paid for in excess of twenty-five thousand dollars.

f. That such corporation as a condition of its being permitted to begin or continue doing business within this state, shall comply with all the laws of the state with regard to foreign corporations. In case of failure to file said report in the time above stated, the corporation shall pay to the secretary of state a penalty of twenty-five dollars, if the same is filed before May first. In case said report is not filed by May first, or if said corporation shall remove or make application to remove into any district or circuit court of the United States any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within this state, the license issued to said corporation shall be void, and the secretary of state shall enter such forfeit in the records in his department. (*1907 c. 562.*)

Actions against; service upon. 8. Actions may be brought against any corporation in the name by which it is commonly known. All summons, notice, pleading or process, relating to foreign corporations which have been licensed under the provisions of this chapter, shall be served on the secretary of state in duplicate, one copy to be filed by him in his office, and the second copy to be forwarded by mail forthwith, postage prepaid,

and directed to such corporation at its principal place of business in the United States, as shown by the last sworn statement on file in his department, and at the time of serving said papers a fee of two dollars shall be paid to the secretary of state, which said fee shall be taxed as taxable costs in the action. (*1907 c. 562.*)

Articles; statements, when required. 9. In case any corporation shall not have any articles of incorporation, organization or association, it shall file in the office of the secretary of state the sworn statement above required of other corporations, and shall include in such statement a statement to the effect that such corporation has no articles of incorporation, organization or association. Such corporation shall file an annual report, as above required of other corporations, and shall pay the same fees and be subject to the same penalties as such corporations.

Contracts made before filing articles; liabilities; restrictions, powers. 10. All foreign corporations and the officers and agents thereof doing business in this state, shall be subjected to all the liabilities and restrictions that are, or may be imposed upon corporations of like character, organized under the laws of this state, and shall have no other or greater powers.

Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them.

Penalty. 11. The failure to comply with any of the provisions of this section shall, for such violation, subject the corporation or any agent, officer or person acting for it in this state, to a penalty of five hundred dollars, to be sued for and recovered in the name of the state with the costs of prosecution, by the attorney-general or by the district attorney of any county in which it or any of its agents or officers shall be located, or reside, or transact or attempt to transact any business; and such penalty, when recovered, shall be paid into the treasury of the

county for the benefit of the school fund. Such penalty shall not attach where a specific penalty is herein provided.

Subsections 3 and 4 when not to apply. 12. The provisions of subsections 3 and 4 relating to statements first to be filed and the fees first to be paid by a corporation of another state, shall not apply to any such corporation now actually doing business in this state under a license heretofore issued.

License; conditions imposed. Section 1770*c*. The secretary of state, shall, upon being satisfied that such foreign corporations, joint stock company, express company, has fully complied with the requirements of the preceding section, and all other provisions of law governing such corporations or associations, deliver to such corporation or association, as the case may be, a license to transact business in this state, which such license shall continue in force until revoked. And such license shall contain the conditions upon which such foreign corporation or association is permitted to do business in this state. (*1901 c. 399.*)

Foreign corporations not to transact business unless licensed. Section 1770*d*. No such foreign corporation or association, except such as have heretofore filed with the secretary of state copies of their articles of incorporation or association and have complied with the laws then in force, shall transact any business in this state without first having paid the license fee prescribed by section 1770*b* and obtained a license as provided in section 1770*c*. (*1901 c. 399.*)

Jurisdiction of circuit courts over. Section 1770*e*. The circuit courts shall have jurisdiction to give proper remedies to all persons injured or damnified or threatened with injury or damage, by any unlawful or illegal act of any such foreign corporation or association, or by any violation of any provision of law, and for the purpose of enforcing any of the penalties imposed upon such foreign corporations or associations by law. (*1901 c. 399.*)

Removal to Federal Court. Section 1770*f*. Whenever any foreign corporation doing business in this state shall remove or make application to remove into any district or circuit court of the United States any action or proceeding commenced against it by any citizen of this state, upon any claim or cause of action arising within this state, it shall be the duty of the secretary of state, upon such fact being made to appear to him, to revoke the license of such corporation to do business within this state. (*1905 c. 506.*)

Combinations; trusts. Section 1770*g*. Any foreign corporation which shall enter into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in the state, or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure by which its price to the public shall be in any manner controlled or established, shall, upon proof thereof, in any court of competent jurisdiction, have its license or authority to do business in this state cancelled and annulled. (*1905 c. 506.*)

Statement of non-violation. Section 1770*h*. No foreign corporation shall be authorized to file its charter or articles of incorporation or association with the secretary of state, or be authorized to do business in this state unless it shall at the time of making application therefor, file with the secretary of state an affidavit executed by its president, secretary or general managing officer stating that such corporation has not violated any of the provisions of section 1770*g*; and every such corporation shall upon filing its annual statement with the secretary of state, make and attach thereto the affidavit of its president, secretary or general managing officer, fully stating the facts in regard to the matters specified in section 1770*g*. (*1905 c. 506.*)

Ouster. Section 1770*i*. Upon complaint being made to the attorney-general and evidence produced to him which shall satisfy him that any such foreign

corporation has violated any of the conditions specified in sections 1770*f* and 1770*g*, he shall forthwith bring an action in the name of the state in any circuit court of this state, to have the license of such corporation to do business in this state, cancelled and annulled and upon due proof being made thereof to the satisfaction of the court, judgment shall be entered therefor. The provisions of section 1791*m* shall extend to all proceedings under this and the two foregoing sections. (*1907 c. 506.*)

Real property acquired before complying with Section 1770b. Section 1770*j*. 1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of section 1770*b* of the statutes, and which has thereafter, and before the passage of this section, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired, and the title so acquired, or attempted to be acquired, is hereby confirmed.

2. Any person claiming that the legal title of any corporation or of any person claiming by, through, or under such corporation, to any real property acquired, or attempted to be acquired, is invalid by reason of the failure of any corporation coming within the terms of subsection 1 of this section, to comply with section 1770*b* of the statutes, shall commence action to recover the property, or to declare the legal title of said corporation void, or interpose a defense on such grounds, within one year from the passage and publication of this section, and in case of failure to do so his right of action or defense, based upon the failure to comply with said section by any such corporation, shall be deemed to have expired; provided that this subsection shall not affect any action now pending.

Section 4096 (Ch. 231, 1911) relates to depositions of officers, agents and employees of corporations.

Section 4097 (Ch. 232, 1911) provides penalty for refusal or neglect of any officer, agent or employee to appear and testify.

SUPREME COURT, U.S.
FILED
MAR 4 1916
JAMES D. MAHER
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Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 253.

JOHN S. DONALD, SECRETARY OF STATE OF THE STATE OF WISCONSIN, AND WALTER C. OWEN, ATTORNEY GENERAL OF THE STATE OF WISCONSIN,

Appellants,

vs.

THE PHILADELPHIA & READING COAL & IRON COMPANY,

Appellee.

Brief on Behalf of Appellee.

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INDEX TO SUBJECTS.

Pages

Statement 1-6

Argument:

I. General aspects of case. Legislation of this class impairs the exercise of a constitutional right and is therefore unconstitutional 6-12

II. The unconstitutionality of the legislation attested by the authorities as:

(a) An abridgement and interference of the jurisdiction of the federal courts 13-16

(b) As requiring a stipulation in advance by a foreign corporation to waive or surrender a right granted under the federal constitution 16-20

(c) As an unlawful restriction on a right incidental to interstate commerce and attempted interference with corporations engaged in that commerce 20-22

(d) As violative of the equal protection provision of the fourteenth amendment 22-25

III. Reply to certain specific contentions of the appellants' argument 25-32

IV. The Doyle and Prewitt cases should be overruled 32-48

V. Conclusion 48-52

CASES CITED.

Pages

Western Union Tel. Co. v. Kansas, 216 U. S. 1 ..... 6, 10, 33, 45, 50, 51
Pullman Co. v. Kansas, 216 U. S., 56 ..... 6, 10
Ludwig v. Western Union Tel. Co., 216 U. S. 146 ..... 7, 10, 45
Herndon v. Chicago, etc. Ry.., 218 U. S. 135 ..... 7, 8, 10, 22, 49
Harrison v. Secretary of State, 232 U. S. 318 ..... 7, 8, 9, 11, 14, 15, 29
New York Life Ins. Co. v. Head, 234 U. S. 149 7
Mo. Pac. Ry. Co. v. Larrabee, 234 U. S. 459 7
Phoenix Ins. Co. v. McMasters, 237 U. S. 63 ..... 7, 11, 47
Western Union Tel. Co. v. Andrews, 216 U. S. 165 12
Insurance Co. v. Morse, 20 Wall. 445.. 17, 33, 34, 37
Barron v. Burnside, 121 U. S. 186.. 17, 18, 19, 34, 37
Southern Pac. Ry. v. Denton, 146 U. S. 202 17
Security Mutual Ins. Co. v. Prewitt, 202 U. S. 246 ..... 19, 20, 41
International Book Co. v. Pigg, 217 U. S. 91 ... 21
International Book Co. v. Peterson, 218 U. S. 664 21
Buck Stove Co. v. McVickers, 226 U. S. 205 21
Pembina Mining Co. v. Pennsylvania, 125 U. S. 181 25
Gulf etc. Ry. v. Ellis, 165 U. S. 150 25
Blake v. McClung, 172 U. S. 239 25

Western Union Tel. Co. v. Julian, 169 Fed. Rep. 166 24-30
Doyle v. Continental Ins. Co., 94 U. S. 535 ..... 32, 34, 38
Paul v. Virginia, 8 Wall. 168 ..... 33, 34
Bank of Augusta v. Erle, 13 Pet. 519 36
Southern Ry. v. Greene, 216 U. S. 400 49
American Smelting etc. Co. v. Colorado, 204 U. S. 103 49

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Appellee.

Brief on Behalf of Appellee.

The present appeal is taken from an order of the District Court for the Western District of Wisconsin, Judges Kohlsaat, Geiger and Sanborn, adjudging the unconstitutionality of a local statute of the State of Wisconsin and enjoining its enforcement by appellants as the administrative officers of the State.

STATEMENT.

As the facts are quite fully covered in the statement appended to the brief of appellant in this court, it is only necessary to review them summarily here, alluding to certain salient features there omitted.

Appellee (hereinafter for convenience termed complainant) a Pennsylvania corporation, has, for many years been established within the State of Wisconsin, conducting and carrying on within that state the business of both interstate and intrastate commerce. It was thus established within the state previous to the latter's adoption of the first of its regulatory or so-termed foreign corporation statutes. The earliest of these enactments was substantially limited to the requirement that all foreign corporations either doing or intending to do business in the State, should file copies of their Charters or Articles of Incorporation; appoint a resident agent for the service of process; pay a nominal license fee and receive from the Secretary of State a license for the transaction of business.

Vol. 1, *Sanborn & Berryman's Wis. Statute* 1898, Sec. 1770-b.

Failure of compliance with this statute subjected the corporation to various penalties and amongst others, that all contracts made within the State by such corporation should be null and void when asserted or relied upon by it but valid and enforceable when asserted against it.

The Bill alleged that notwithstanding complainant was in doubt as to the application of this statute to a corporation of its character, the terms of the Act were complied with and it is admitted the license was regularly issued to it about November 1st, 1898, and had never been revoked (Rec., 20 par. VIII).

By successive amendments to the Act in question

by Chapter 351 of the General Laws of 1899, Chapter 399 of the Laws of 1901 and Chapter 434 of the Laws of 1901, certain changes of formal character were made. By Chapter 596 of the General Laws of 1905, the original Act was amended in various essential particulars, amongst which the following have immediate bearing on the questions in controversy.

Hereunder every foreign corporation seeking admission to the State and every one previously therein domiciled, was required as a condition to its admission or to the continuance of its business, to file certain sworn statements, containing among other things a stipulation that such corporation would comply with all the laws of the State relative to foreign corporations.

Sec. 1770-b paragraph 3, Subdivision "h".

By Paragraph 6 of the Act, the following provision was made:

> "The license of such corporation to do business in this state shall be revoked if it shall remove or make application to remove into any District or Circuit Court of the United States, any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within this state."

By Paragraph 7, the Act provided that every foreign corporation which had complied with the previous law should file an annual sworn report which was required to state among other things, Subdivision "h", as follows:

> "That such corporation as a condition of its being permitted to begin or continue doing

> business within this state shall comply with all the laws of the state with regard to foreign corporations. * * * In case said report is not filed by April 1st, or if said corporation shall remove or make application to remove into any District or Circuit Court of the United States any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within this state, the license issued to said corporation shall be void and the Secretary of State shall enter such forfeiture in the records in his Department."

By Section 1770-f, it was provided as follows:

> "Whenever any foreign corporation doing business in this state shall remove or make application to remove into any District or Circuit Court of the United States any action or proceedings commenced against it by any citizen of this state, upon any claim or cause of action arising within this state it shall be the duty of the Secretary of State, upon such fact being made to appear to him, to revoke the license of such corporation to do business within this state."

It will thus be observed that the statute was made indiscriminately applicable to corporations seeking for the first time admission to the state, as well as those previously located and established therein in conformity with the pre-existing laws. Also, that both such classes of corporations were required, as a condition to entering the state for the transaction of business or continuing therein, if previously established and licensed, to stipulate to abide the various conditions enumerated, and amongst others, to refrain from exercising the constitutional right of removing a cause to the Courts

of the United States.

It will also be observed that by one of the provisions quoted above, the act of such removal automatically forfeited the privilege of doing business in the state, thus exposing the offending corporation to the prescribed penalties.

Also that both by the provision last mentioned as well as those of Section 1770-f, it was made the duty of the Secretary of State to enter such forfeiture in the records of his Department and to revoke the license of the corporation.

By Section 1770-i, it was made the duty of the Attorney General, on the fact of the violation of the condition against the removal of a cause being made to appear to him, to institute an action for the revocation of the license and upon proof of that fact, the Court was required to enter judgment of such revocation.

In addition to the penalty of forfeiture thus indicated, various other penalties, which need not receive detailed mention, were prescribed by Paragraph 11 of Section 1770-b.

Complainant having removed a cause of action brought by a citizen of the State of Wisconsin against it, on a cause of action arising within that State, into the District Court of the United States, a petition for the revocation of its license was lodged with the Secretary of State. The latter, acting in conjunction with the Attorney General, ruling that the provisions of the statutes indicated were mandatory and left no discretion with respect to their execution by the administrative officers of

the state, application was seasonably made to enjoin the threatened action. The matter having been brought for hearing on motion for a temporary injunction, was heard on the Bill and Answer resulting in the order from which the present appeal is taken.

By reference to the Answer of the defendants it will be noted that the essential averments of the Bill are admitted, substantially the only denials being on information and belief.

It was held in substance by the lower court, that the acts in question were unconstitutional, as in effect imposing the requirement that foreign corporations, seeking to do business in that state, should stipulate to waive a right guaranteed under the Federal Constitution.

ARGUMENT.

I.

General Aspects of the Case. Legislation of this Class Impairs the Exercise of a Constitutional Right and is Therefore Unconstitutional.

In the light of the later decisions of this court, it would seem that nothing more than the statement of facts was required to demonstrate the unconstitutionality of the legislation in question.

See

Western Union Telegraph Co. v. Kansas, 216 U. S. 1.

Pullman Co. v. Kansas, 216 U. S. 56.

Ludwig v. Western Union Telegraph Co., 216 U. S. 146.

Herndon v. Chicago, etc. Ry., 218 U. S. 135.

Harrison v. Secretary of State, 232 U. S. 318.

New York Life Ins Co. v. Head, 234 U. S. 149-164.

Mo. Pac. Ry. Co. v. Larabee, 234 U. S. 459, 472-473.

Phoenix Insurance Co. v. McMasters, 237 U. S. 63-71-72.

The case is indistinguishable in principle from the *Herndon* and *Harrison cases, supra*, both as respects the character of the legislation brought in question and the right to relief from the arbitrary penalty of forfeiture of the privilege of doing business within the state.

In each of those cases, amongst other conditions attached by the local law to the privilege of beginning or continuing business within the state, was the inhibition against the removal of a cause of action into the courts of the United States. In each, a removal had been effected notwithstanding the provisions of the law, and proceedings had either been taken or threatened to oust the corporation or forfeit its license by reason of this fact. Appropriate equitable relief enjoining the consummation of such acts, by the administrative officers of the state, was sought challenging the constitutionality of the requirements as opposed to the Federal Constitution. The decree in each instance determined the unconstitutionality of the laws and enjoined their threatened enforcement.

Both decrees were affirmed by this Court on consideration of the broad general principle that the power of the states, in dealing with foreign corporations, did not extend to imposing conditions contravening the Constitution of the United States either directly or indirectly. Also, that the imposition of penalties of so drastic a nature for the exercise of such a constitutional right and obviously calculated to prevent its exercise, was equivalent to a prohibition and therefore fell within the rule against accomplishing by indirection that which was directly prohibited.

There, as here, the local law obviously aimed at inhibiting the exercise by a foreign corporation of its constitutional right to invoke the jurisdiction of the United States Courts in an appropriate case. It was held in each instance, that regardless of the form of the enactment, the court would look to the substance and if, as a result, its natural and necessary consequence was to impair a right or restrain the exercise of a privilege granted by the Federal Constitution, it must be held unconstitutional and void.

The argument of appellant in the case at bar has failed to indicate any substantive basis of distinction between the legislation there condemned and that in controversy in this case. The contentions advanced in support of the legislation in the *Herndon* and *Harrison cases* followed substantially the same stereotyped lines which had been many times previously presented to this Court. Those now advanced are not materially dissimilar. Such claims

as that the object of legislation of this character is to place all corporations doing business within the State on an equal footing; that laws visiting the penalty of forfeiture of the right to do business, in the event of a foreign corporation's removing a cause to the United States Court, in no wise impair the jurisdiction of those courts; that the effect of such legislation is not to restrict the right of doing business but to make it optional with the corporation whether it will continue to do business or not, etc., have been repeatedly urged on the consideration of this court, as will be sufficiently indicated by reference to the abstracts of the briefs of counsel appended to the reports of the decisions indicated.

In considering the subject in the more general aspects thus suggested, we need not pause to analyze the source, from which the doubtful power of enacting such legislation, as that in question, was formerly assumed to have proceeded. It will suffice to state, as held in the *Harrison case*, that if any basis remains for the assumption of the existence of any such power on the part of the states, it has been so far narrowed and limited, as to be wholly without application, where invoked as against corporations engaged in whole or in part, in interstate commerce within the limits of the state.

The distinction between the attempted exercise of any such power over a corporation *already domiciled* within the state, in accordance with the previous policies of its laws and its similar exercise as against a corporation *seeking admission in the first*

instance, was quite clearly brought out in the concurring opinion of the present Chief Justice in the *Western Union* and *Pullman cases, supra.* The same opinion clearly emphasizes the distinction between that class of cases where the power of the state was assumed to be *absolute* in respect to foreign corporations and those where it was necessarily *relative*, with the result that in the latter there was no basis or justification in the authorities for assuming the existence of the right to impose unconstitutional requirements as a condition to doing business in the state.

The decisions in the *Western Union*, *Pullman* and *Ludwig cases, supra*, both in their reasoning and conclusions, left relatively little basis for the assumption of power by the states, under any circumstances or with reference to any class of corporations, to require as a condition to the doing of business therein, the waiver or surrender of a constitutional right.

In fact, if a contrary rule may be assumed to have been previously sanctioned, little more is required than the statement in the dissenting opinion in the first of those cases by Mr. Justice Holmes, to the effect that as a consequence of the prevailing opinion therein rendered, that rule must be assumed to have been abandoned.

The *Herndon case* recognized no exception to the general rule, that it was beyond the power of the states, under any circumstances, to impose conditions or requirements on foreign corporations involving a denial of their constitutional rights.

While this case had to do with a commercial corporation, using that term in its constitutional sense, the failure of recognition of any exception to the general rule there announced, is significant.

The *Harrison case* mentioned the exception, to express doubt as to its legal status, in view of the court's later decisions.

Finally, the *McMasters case* which had to deal with a non-commercial corporation, stated the rule broadly and as without exception, to the effect that while power might be assumed to exist in the states to impose such conditions as they saw fit, on the privilege of foreign corporations doing business within their limits, the power thus assumed could not be held to extend to imposing any condition violative of the Constitution of the United States or requiring the abandonment or surrender by the corporation of its constitutional rights.

From a constitutional standpoint, the various rights guaranteed by the Constitution are on a par and no sound basis can be found for a denial of one, that would not be equally applicable to the other. The right of recourse to the Federal courts in the cases provided by the Constitution and laws is therefore, no more subject to impairment at the hands of the states than any other of the constitutional guaranties. This is virtually conceded in the argument of the Attorney General in the present case as will be more fully pointed out later in this brief. In fact, the entire argument of the Attorney General seems to be directed at demonstrating the single point, that if legislation of the

character in question can be sustained under any circumstances or as to any corporations, *the justification therefor must be found on grounds wholly foreign to anything announced in the only decisions of this court which lend any sanction to such legislation for any purposes whatsoever.* The concession, as we construe the argument, that the *Doyle* and *Prewitt cases, infra,* are indefensible in principle and contrary to fundamental conceptions of constitutional jurisprudence, removes the only possible support for legislation of this character.

In view of these general observations, the unconstitutionality of the legislation involved in this case, under any circumstances or for any purposes whatsoever, is hardly open to doubt and the order restraining its threatened enforcement was properly granted.

Western Union Telegraph Co. v. Andrews, 216 U. S. 165.

II.

The Unconstitutionality of the Legislation Attested by the Authorities as:

(a) An Abridgement and Interference of the jurisdiction of the Federal Courts;

(b) As Requiring a Stipulation in Advance by Foreign Corporations to Waive or Surrender a Right Granted Under the Federal Constitution;

(c) As an Unlawful Restriction on a Right Incidental to Interstate Commerce and Attempted Interference with Corporations Engaged in that Commerce;

(d) As Violative of the Equal Protection Provision of the Fourteenth Amendment.

1. No amount of specious argument can successfully refute the obvious motive of legislation of the character in question as, indirectly at least, attempting to abridge or impair the jurisdiction of the Courts of the United States. In fact, it is self-evident that nothing could be more effectual, in the accomplishment of the result indicated, than the imposition of such a penalty for invoking the jurisdiction of those courts, as the revocation of the license to do business within the state, with the practical confiscation of valuable and established property rights necessarily incident to the conduct of that business.

In the decision rendered in the lower court, the Judges discussed at some length the proposition that statutes of this character were equivalent to

a prohibition upon the well recognized theory of the criminal law that an express prohibition is unnecessary. Where penalties and punishments are attached to the doing of an act, it is the legal equivalent of a prohibition and these results were held to characterize the legislation in question, in their bearing on the exercise of the constitutional right of removal of causes to the Federal Courts. Thus it was said in the opinion below:

> "The state says to the Telegraph Company or Coal Company, 'You are in the state lawfully for interstate and government business. * * * If you remove to a Federal Court any case whether in your interstate or local business brought against you by a citizen of Wisconsin on a cause of action arising therein, your license to do a local business will be revoked. Any contract not in interstate commerce you may thereafter make will be void in your favor but valid against you, and any conveyance of land for local purposes which you may take will not vest any title'. This is a substantial command or prohibition. It is the same as saying, you shall not remove such a case" (Rec., p. 23).

But with the statute construed as otherwise than the equivalent of an express prohibition, the results would be the same, if the ordinary and natural effect of its operation was manifestly to abridge or impair the jurisdiction of the Federal Courts. The rule controlling on this phase was clearly stated by the Chief Justice in the *Harrison case, supra,* as follows:

> "It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pur-

> suant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority *in any form, directly or indirectly, destroy, abridge, limit or render inefficacious.* * * * The right unrestrained and unpenalized by state action on compliance with the forms required by the law of the United States to ask the removal of a cause pending in a State to a United States court is obviously of the very essence of the right to remove conferred by the law of the United States."

After commenting on the character of the Act involved in that case which is indistinguishable in principle from that under consideration in the case at bar, the Chief Justice continues:

> "When the nature of the statute is thus properly appreciated, nothing need be further said to manifest its obvious repugnancy to the Constitution or to demonstrate the correctness of the decree of the court below."

Upon consideration of the *Western Union, Pullman, Herndon* and other cases above cited, the Chief Justice concludes as follows:

> "Indeed, the ruling in the *Herndon Case* and in those subsequent to the *Doyle* and *Prewitt cases*, most of which were reviewed in the *Herndon case,* demonstrates that no authority is afforded by those two cases for the conception that it is within the power of a State in any form, directly or indirectly, to destroy or deprive of a right conferred by the Constitution and laws of the United States."

It is wholly futile, in the light of the rulings indicated, for appellants to argue as they have in their brief, that the legislation in question is not the

equivalent of a prohibition; that the whole matter is left to the voluntary action or option of the corporation and that the latter is equally within the law whether it exercises or refrains from exercising its constitutional right of removing a cause to the United States courts.

By a parity of reasoning, one might claim that violation of various criminal laws was optional with the offender, subject only to the condition of inviting and accepting the prescribed punishment.

Perhaps the best answer to the argument may be found in the inquiry whether the statute was enacted with the idea of any such option as that suggested, or, on the other hand, was couched in such terms and violation of its provisions visited with penalties of such drastic nature as to preclude any such option? Considerations of purely practical character leave no doubt of the intention between these alternatives and disclose the obvious and natural result of prohibiting recourse to the Federal Courts.

Under the decisions to which attention has already been directed, this feature alone establishes the unconstitutionality of this legislation.

2. The lower court considered that the invalidity of the legislation could be satisfactorily rested on the consideration that it in effect required a stipulation in advance from foreign corporations, seeking to enter or to continue business in the state, to waive or surrender a Federal right.

In view of the decisions which have already been reviewed, extended argument on this phase is un-

necessary. In the light of the authorities, it is undeniable that if the effect of the legislation be to require such a stipulation, it is unconstitutional and void for any purposes whatsoever and this wholly regardless of the character of the corporation or the nature of the business in which it is engaged.

This concession was made in the *Prewitt case,* to be later reviewed, in deference to the conception of the majority of the Court in that case of the previous holdings in *Insurance Co. v. Morse,* 20 Wall. 445; *Barron v. Burnside,* 121 U. S. 186 and *Southern Pacific Co. v. Denton,* 146 U. S. 202.

Hence, the only question on this phase of the case is whether the legislation in question had the effect indicated. The negative of this proposition is strenuously urged in appellant's brief but the argument in this behalf is somewhat too refined for practical purposes.

As already stated by Paragraph 7 of Section 1770-b it is provided:

> "That every foreign corporation which has heretofore filed with the Secretary of State a copy of its Charter or Articles, shall file a sworn statement which shall state * * * (Sub-division 'h') that such corporation as a condition of its being permitted to begin or continue doing business within this state, shall comply with all the laws of the state with regard to foreign corporations."

In the same sub-section it is provided as follows:

> "If said corporation shall remove or make application to remove into any district or circuit court of the United States any action or proceeding commenced against it by any citi-

> zen of Wisconsin upon any claim or cause of action arising within this state, the license issued to said corporation shall be void, and the Secretary of State shall enter such forfeit in the records in his Department."

Notwithstanding the provision with respect to removals is incorporated in the same sub-section, providing for the stipulation by the corporation to comply with *all* laws of the State with reference to foreign corporations, it is contended the stipulation has no reference to this requirement but should be interpreted as aimed exclusively at other features of the Act.

As this law was directed exclusively at foreign corporations and as the stipulation, required in advance, was to the effect that the applicant would comply with *all laws* relating to foreign corporations, we fail to observe how it may be thus excluded from the stipulation's terms.

The fact that the stipulation itself did not expressly mention the particular law, can have no bearing. If the requirement were legal and valid, as a waiver, its terms, by necessary intendment, would be held to cover every law of the state relating to foreign corporations, with precisely the same force and effect as though those laws had been expressly enumerated in its terms.

The resulting situation however in principle is indistinguishable from that presented in *Barron v. Burnside, supra.* The local law there in question provided that every foreign corporation desiring to transact business within the State of Iowa should file an application for a permit accompanied by a

certified copy of its Articles, etc. The application was required to contain a stipulation that the permit should be subject to each of the provisions of the Act. One of the sections of the Act provided that if the corporation removed a cause brought in the State Court on a contract or liability incurred within the state into the United States Court, the permit should be revoked. Commenting upon the effect of these provisions, this Court said as follows:

> "It is apparent that the entire purpose of this statute is to deprive the foreign corporation, in suits such as those mentioned in Sec. 3, of the right conferred upon it by the Constitution and laws of the United States, to remove a suit from the state court into the Federal Court, either on the ground of diversity of citizenship or of local prejudice. The statute is not separable into parts. An affirmative provision requiring the filing by a foreign corporation, with the Secretary of State, of a copy of its Articles of Incorporation, and of an authority for the service of process upon a designated officer or agent of the state, might not be an unreasonable or objectionable requirement, if standing alone; but the manner in which, in this statute, the provisions on those subjects are coupled with the application for the permit, and *with the stipulation referred to*, shows that the real and only object of the statute, and its substantial provision, is the requirement of the stipulation not to remove the suit into the Federal Court." * * *

In commenting on the decisions in the case last cited as well as the *Denton case, supra*, it is stated in the majority opinion in the *Prewitt case* (202 U. S. 246, 256) as follows:

> "It is urged that the Iowa and Texas statutes do not require an agreement not to remove. The Iowa statute provided that the application for a permit should contain a stipulation that the permit should be *subject to each of the provisions of the Act*, among which was one that the corporation should forfeit the permit if it should remove the case. *This was held to be, in effect, a stipulation not to remove*, exacted as a condition for granting the permit. And so the court said:
>
> 'As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void.'
>
> In other words, the statute was regarded as *exacting an agreement in advance not to remove a case*, and such being the fact it was held that the statute was void."

We fail to perceive any logical ground of distinction between an application stating that the resulting permit shall be subject to the terms of the Act and a sworn statement (obviously subserving the same purpose as an application) which is required to state that the corporation will comply with the terms of the Act. If anything, the conclusion of the stipulation or agreement of waiver is seemingly stronger in the latter than in the former case. Independently therefore, of all other considerations, this feature alone as held by the lower court, sufficiently attests the unconstitutionality of the legislation.

3. No argument is required to demonstrate that, as applied to corporations engaged in interstate

commerce within a state, restriction of the right to the ordinary legal processes and remedies of the courts is both an interference with and impairment of the commercial privilege.

International Book Co. v. Pigg, 217 U. S. 91.
International Book Co. v. Peterson, 218 U. S. 664.
Buck Stove Co. v. Vickers, 226 U. S. 205.

In fact, *International Book Company v. Peterson, supra*, involved the general features of the very law with which we have to deal, and it was held unconstitutional as abridging the commercial provision of the Constitution. That case dealt with the features of the law denying foreign corporations which had failed to comply with its requirements, the right of recourse to the courts of the state and did not therefore present the precise provision in which we are interested. In so far, however, as the unconstitutionality of the law was predicated of restricting the exercise of rights ordinarily incidental to the conduct of interstate commerce, the conclusion is controlling here. It cannot be successfully contended that the commercial right is not impaired where its exercise is not attended by every privilege fairly incidental thereto, one of such privileges being the ordinary right of recourse for the settlement of controversies arising or growing out of the conduct of that commerce in the Courts of the United States.

The statute inhibits the removal of any cause arising within the state and brought by a citizen

thereof to the courts of the United States and thus, of necessity, prevents recourse to those courts in subjects which may have exclusive reference to transactions in interstate commerce.

But, wholly apart from the precise phase of the question thus suggested, is the conclusive consideration that the power of the state does not extend to imposing conditions or restrictions of the character indicated on corporations engaged in interstate commerce, as sufficiently indicated in the cases already reviewed.

The circumstance that such corporations may engage in the conduct of an incidental local, as well as interstate commerce within the state, furnishes no justification for the attempted imposition by the state of any unconstitutional requirements.

4. That legislation of the character in question is discriminatory and operates as a denial of the equal protection clause of the Fourteenth Amendment is fully attested in the *Herndon case, supra,* wherein it was said as follows:

> "Under the statute in controversy a domestic railroad company might bring an action in the Federal Court, or in a proper case remove one thereto, without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the act. * * * In all cases in this court, discussing the right of the States to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, it has been conceded that while the right to do local business within the State may not have been derived from the Federal Constitution, the right to resort to the Federal courts is a creation of the Constitution of

> the United States and the statutes passed in pursuance thereof."

It was said by the lower court in substance, that assuming the discrimination thus indicated existed, its operative effect would be comparatively narrow in view of the jurisdictional provisions of Section 28 of the Federal Judicial Code.

For a variety of reasons the suggestion thus indicated is inconclusive. The mandates of the Constitution are inflexible and admit of no speculative mathematical deductions as to the number of instances in which the effect of forbidden legislation may be operative.

It is necessarily conceded that a domestic corporation could remove a cause to the Federal courts of the state in the cases provided by law without incurring any penalties whatsoever. The arbitrary denial of the same constitutional right to foreign corporations or what is the same thing, attaching to its exercise the penalties provided by the law's terms, clearly condemn it as discriminatory and unconstitutional.

But the discrimination thus indicated is not limited to the feature suggested for the obvious reason that in its operative effect the law arbitrarily segregates from the persons within the jurisdiction of the state, foreign corporations and excludes the latter from the privilege of the exercise of the constitutional right which other non-residents (using the term as synonymous with citizenship) may exercise under the Federal Constitution and laws.

All persons, partnerships and unincorporated

organizations or associations domiciled within the state and whose citizenship is such as to bring them within the conditions prescribed by law for invoking the jurisdiction of the Federal Courts by removal, may exercise this privilege, which, by force of the statute in question, is denied as to foreign corporations, therein domiciled, alone.

The resulting situation and its consequences were clearly stated by the court in *Western Union Telegraph Company v. Julian,* 169 Fed. Rep. 166-172, as follows:

> "Under the laws of Alabama, no domestic corporation, *much less a natural person,* is punished by the forfeiture of any right whatever if it bring a suit in the Federal court, as it may when a federal question is involved, or remove a case to the Federal court, as it may when sued in the state court by a citizen of another state. Directly the opposite rule is declared by the statute if the foreign corporation resorts to the Federal court. * * * If the foreign corporation goes into a particular court it shall be subject to an invidious penalty, going to the extent of forfeiting its right to do business here, which penalty is not, and cannot be, visited upon domestic corporations and natural persons under these circumstances. * * * They are also noxious to Section 1 of the Fourteenth Amendment, in that they deny the equal protection of the laws by inflicting pains and penalties upon one person or class of persons for doing an act which, when done by any other person, under the same circumstances, subjects him to no burdens or pains whatever, and in no manner interferes with his right to do business in this state."

There is no question of course, that a corporation is a person within the meaning of the Four-

teenth Amendment.

Pembina Mining Co. v. Pennsylvania, 125 U. S. 181.

Gulf etc. Ry. v. Ellis, 165 U. S. 150.

Blake v. McClung, 172 U. S. 239.

It cannot be successfully claimed that any logical or legal reason exists for arbitrary classification with respect to such a subject-matter as the right of invoking, in the ordinary way, the jurisdiction of the United States courts and the attempted exclusion of foreign corporations, from the exercise of this privilege, is clearly discriminatory within the meaning of the Amendment.

III.

Reply to Certain Specific Contentions of the Appellants' Argument.

It is not proposed to attempt to follow in detail the various grounds urged by appellants in favor of the constitutionality of the legislation here in question. The contentions in their last analysis appear to resolve themselves on the following:

(a) It is the policy of the State of Wisconsin to place, as far as possible, both foreign and domestic corporations doing business in that State on substantially the same footing and the legislation in question had this single object in view.

(b) That unless power to enact such legislation be conceded to the state, foreign corporations may

enjoy various privileges, which are denied to domestic corporations, with the result of obstructing the state in the administration of its local policies and similarly obstructing the citizens of the state in invoking and pursuing the ordinary remedies prescribed by local law.

(c) That the rules of comity generally governing the rights of corporations in states foreign to those of their organization do not require extending to such corporations, privileges which are denied or withheld from domestic corporations.

(d) That local legislation, having no other purpose or object than placing all corporations, within the jurisdiction of the state, on the same footing and which is equally operative as to all, cannot be held discriminatory.

(e) The circumstance that discrimination is manifest in excluding foreign corporations from invoking the jurisdiction of the Federal courts in the first instance where that jurisdiction might be invoked by domestic corporations, is of nominal significance and should be disregarded as the statute does not attempt to deny the former's resort to the Supreme Court of the United States, to review the final decrees of the state court.

(f) That the legislation in question cannot be sustained on the authority of the *Doyle* and *Prewitt cases* unless the rule of those cases be "properly qualified and limited in its scope."

(g) That literally construed, the *Doyle* and *Prewitt cases* would extend the power of the states to the imposition, on foreign corporations of every form, of unconstitutional requirements, as a condition to the doing of business in the state. Incidentally, the dissenting opinion of Mr. Justice Day in the *Prewitt case* with the reasoning there employed denying the existence of any such power, is approved.

(h) That the question whether a foreign corporation is a commercial or non-commercial organization (using the term "commercial" in its constitutional sense), is not decisive and that there is no more reason for assuming existence of power in the states to impose unconstitutional requirements on the latter than on the former, as conditions to the privilege of doing business.

(i) That the circumstance the state requires an agreement or stipulation in advance furnishes no logical ground for determining the constitutionality of the power exercised by it with respect to foreign corporations.

(j) That where a requirement, imposed by a state on a foreign corporation as a condition to doing business therein, contravenes any provision of the Federal Constitution, it must be held void unless the power to exact such requirement may be predicated of some other provision of that Constitution.

(k) That while the legislation in question contravenes the judicial clause of the Constitution, authority for its enactment may be found in the Fourteenth Amendment.

In the foregoing summary, we omit reference to the contentions that the statute in question cannot be held an interference with interstate commerce as it is exclusively aimed at the privilege of conducting local commerce; that it in effect leaves the corporation to decide for itself and if it elects to do the things which result in the revocation of its license, this proceeds from its own voluntary action; and finally, if the statute be sustained and the license revoked, the resulting destruction of the business would not constitute a technical confiscation of the property.

These latter features have either been fully answered in the decisions already reviewed or are unnecessary to the determination of the questions which are here decisive.

Coming to the specific matters suggested above, it will be observed that no supposed domestic policy of the state can be permitted to override constitutional limits. The mandatory requirements of the Federal Constitution cannot permit of either limitation or qualification on any such grounds for reasons that are so obvious as to require no comment.

We have nothing to do with rules of ordinary comity, which, broadly speaking, are only to be invoked in cases where the question at issue is not controlled by positive mandate.

No rule of supposed comity can be invoked to either enlarge or diminish a right granted by the Federal Constitution, and where the latter right is invoked, it is necessarily to be determined by the interpretation of the constitutional guaranty alone.

If it be assumed (and every one knows that such is not the fact) that legislation of this class is enacted for the purpose of placing foreign and domestic corporations on an equal footing, the ostensible object could not save it from condemnation, if its requirements contravene the Constitution. An unconstitutional enactment is none the less unconstitutional because of some supposedly or assumed meritorious purpose sought to be accomplished.

The contention that as result of this Act, all corporations within the state are placed on substantially the same footing is best answered by the language of the Chief Justice in the *Harrison case, supra*, as follows:

> "The contention so much insisted upon, that the act should not be declared unconstitutional because it does not discriminate, we assume refers to the provision of the statute creating an arbitrary standard of state citizenship and domicile; but as we see no possibility of separating that provision from the unconstitutional attempt to prevent access to the courts of the United States, there is no occasion to further deal with the subject of discrimination. If, however, we were to separately consider it, at once it is to be observed that the contention proceeds upon a self-evident misconception which is this, *that if only wrong be indiscriminately done it becomes rightful.*"

The contention in this regard, it will be observed, wholly overlooks the authority of the state to arbitrarily discriminate between corporations and other persons, domiciled within its jurisdiction, in respect to the exercise of rights which, under the Constitution and laws are indiscriminately applicable to all alike, a feature already sufficiently discussed.

To the extent it is asserted that the decisions of the *Doyle* and *Prewitt cases* are wrong, we confess to being in hearty accord with the learned Attorney General of Wisconsin. We agree that under those decisions, a state, in the exercise of the powers therein assumed to exist, in its dealing with non-commercial foreign corporations, could exact any form of unconstitutional requirement, under the guise of imposing conditions on the privilege of doing business. We agree with what appears to be his conclusion that no such power should be assumed to exist with respect to any foreign corporation whatsoever. On principle, if the question were open under the authorities, we should be further inclined to agree that the question, whether the state exacted a stipulation or agreement in advance to waive a constitutional requirement, was of less importance than considering whether the conditions actually imposed required the surrender of a right or privilege guaranteed by the Federal Constitution.

The final contention, to the effect, as we understand it, that while the legislation in question may contravene the judicial clause of the Constitution,

authority therefor may be found in the Fourteenth Amendment, hardly requires comment.

It is apparently assumed that the object of the Amendment was to vest or create some power in the states. Hence the assumption that if it appears the local legislation has had for its object the creation of equality of right or insuring that all corporations within the state shall be compulsorily forced into the same courts, authority therefor may be rested on the Amendment itself.

This is sought to be still further reinforced by the contention that the Amendment is solely applicable to what are termed remedial rights; hence, as we understand it, as the legislation, in forcing parties similarly situated into the same tribunals, provides equality of remedial rights, it is within the affirmative power, assumed to be vested in the states, by the Amendment's terms. Construing the judicial clause and the Amendment as *in pari materia*, the former is not violated if the legislation is brought within the latter.

The statement of the contention is seemingly all that is required for its refutation. The effect of the Fourteenth Amendment is purely restrictive. The states derive no power therefrom and any contention that the exercise of a power may be referred to something affirmatively granted by force of the Amendment, involves a complete misconception.

The concessions thus indicated, are necessarily destructive of the entire argument advanced in support of the legislation in question and the correctness of the decree of the lower court might be

rested thereon.

There is, however, a broader phase of the question which we feel justified in urging upon the Court's consideration. It has already been foreshadowed in the previous discussion and may be stated in the general proposition, that legislation of the character in question is unconstitutional and void as to every corporation and under all circumstances. This subject may be appropriately considered under the next following general heading.

IV.

The Doyle and Prewitt Cases Should be Overruled.

It may be said without fear of contradiction that in practically every case in which the supremacy of the Constitution and laws of the United States is sought to be evaded or justification for the exercise of state power overriding the Constitution sought to be found, an argument, by analogy at least, is drawn from these two precedents reported respectively in 94 U. S. 535 and 202 U. S. 246.

It is true those cases had to do exclusively with the powers of the states in dealing with non-commercial, foreign corporations and that by later decisions, as already indicated, not only has their scope been strictly limited, but also serious doubt cast upon the principles therein enunciated. Nevertheless, they have not been overruled and the repeated instances, in which evasions of constitutional requirements have been sought to be justified by the circumstance that they have not been expressly

overruled, are amply attested by the relatively large number of cases which have recently come before this court for review.

It is believed that these cases are wrong in the principles enunciated and wholly irreconcilable with the only conclusions logically deducible from the later decisions of the Court. Having therefore, no longer a place in our constitutional jurisprudence, the controversy injected by their presence will be best set at rest by their formal disapproval. If no other reason existed than the fact that they constitute practically the single exception to the uniform recognition of the supremacy of the Constitution and laws of the United States, this, of itself would furnish all sufficient ground for their exclusion from our contemporary jurisprudence.

The basic and underlying questions involved in these cases were so fully discussed *pro* and *con* in the prevailing and dissenting opinions in the *Prewitt case* as well as *Western Union Telegraph Company v. Kansas, supra*, that further presentation may appear superfluous. The importance of the question however, may justify a brief presentation of the views which attack those cases on principle.

The entire controversy has ranged largely around the general rule establishing the right of the states to exclude foreign corporations other than those deriving their rights from the Constitution and laws of the United States as held in *Paul v. Virginia*, 8 Wall. 168, with the limitation of the general power thus indicated as held in the *Morse case,*

21 Wall. 445, the *Doyle case*, 94 U. S. 535 and the *Barron case*, 121 U. S. 186.

The court is so fully conversant with the conditions presented in these cases as to dispense with the necessity of detailed statement. It should be observed however, that *Paul v. Virginia* merely had to deal with the state's power of exclusion. There was no occasion of determining or passing upon the limitations, if any, on the power of admission.

The significant feature of the *Morse case* is suggested by the following circumstances.

That case having been seasonably removed to the United States Court, the state court was wholly without jurisdiction to try the same. Notwithstanding such removal, it had proceeded to judgment in the lower court which was affirmed by the Supreme Court on appeal. The basis of the decision was the statute inhibiting such removals and the agreement of the corporation to abide thereby. The necessary effect of the statute as thus interpreted was, therefore, a direct limitation of jurisdiction of the Courts of the United States in the cases provided by the Constitution and laws. The decision however, was not thus rested on the immediate effect of the statute as a direct limitation of the Federal jurisdiction. The reasoning of the opinion then rendered presented two separate and distinct propositions, the confusion of which has seemingly been responsible for the subsequent interpolation of conclusions entirely foreign to what was actually decided. The agreement of the corporation to refrain from the Federal Courts *was considered wholly in-*

dependently of the constitutional phase and the conclusion reached in substance, that without regard to the latter feature, *an agreement made by a party in advance to refrain from invoking the ordinary exercise of the judicial power, was a nullity.*

As a necessary consequence, the agreement could neither be asserted nor relied upon as sustaining the state court's jurisdiction.

The second proposition considered by the opinion dealt with the constitutional phase, wholly independent of the agreement, exclusively considering the law itself, in so far as it attached, as a condition to doing business within the state, the prohibition of recourse to the Federal courts.

After referring to the provisions of the Judiciary Act, the Court in the opinion under review said:

> "This applies to all the citizens of another State, whether corporations, partnerships, or individuals. It confers an unqualified and unrestrained right to have the case transferred to the Federal courts upon giving the security required. * * *
>
> The Home Insurance Company is a citizen of New York, within this provision of the Constitution. As such citizen of another State, it sought to exercise this right to remove to a Federal tribunal a suit commenced against itself in the State court of Wisconsin, where the amount involved exceeded the sum of $500. This right was denied to it by the State court on the ground that it had made the agreement referred to, and that the Statute of the State authorized and required the making of the agreement.
>
> * * * *A corporation has the same right to the protection of the laws as a natural citizen, and the same right to appeal to all the courts of the country.* The rights of an indi-

vidual are not superior in this respect to that of a corporation.

* * * We do not consider the question whether the State of Wisconsin can entirely exclude such corporations from its limits, nor what *reasonable* terms they may impose as a condition of their transacting business within the State."

After reviewing the decisions in *Paul v. Virginia* and *Bank of Augusta v. Earle,* the opinion continues:

"It was not intended to impair the force of the language used by Mr. Justice Curtis in the *La Fayette Insurance Company v. French*, 18 Howard 407, where he says: 'A corporation created by Indiana, can transact business in Ohio, only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose, and these conditions must be deemed valid and effectual by other States, and by this court; *provided, they are not repugnant to the Constitution and Laws of the United States*, etc.' Nearly the same language is used by Mr. Justice Nelson in *Ducat v. The City of Chicago*, 10 Wall. 410.

NONE OF THE CASES SO MUCH AS INTIMATE THAT CONDITIONS MAY BE IMPOSED WHICH ARE REPUGNANT TO THE CONSTITUTION AND LAWS OF THE UNITED STATES, OR INCONSISTENT WITH THOSE RULES OF PUBLIC LAW WHICH SECURE THE JURISDICTION AND AUTHORITY OF EACH STATE FROM ENCROACHMENT BY OTHERS."

It will be observed that this reasoning had nothing to do and did not concern itself with the effect of the agreement; on the contrary, had exclusive reference to the right of a state to impose on any foreign corporation an unconstitutional requirement as a condition to doing business within its

limits.

The result in this regard is summarized in the opinion itself in the following language:

> "1st. The Constitution of the United States secures to citizens of another State than that in which suit is brought *an absolute right to remove* their cases into the Federal court, upon compliance with the terms of the Act of 1789.
>
> 2nd. The statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.
>
> 3rd. The agreement of the insurance company derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed."

It has been argumentatively asserted with reference to this case and in fact, may be said to have constituted the basis of the decision in the *Doyle* and *Prewitt cases*, that the statute was held void because of the agreement, or its requirement, as a condition of the corporation's doing business in the State.

The language quoted clearly indicates *the reverse* as true and that instead of the unconstitutionality of the statute being predicated of the agreement, or its requirement, *the invalidity of the agreement was predicated of the unconstitutionality of a statute denying a right guaranteed by the Federal Constitution and laws.*

The foregoing analysis of the *separate* and *distinct* questions involved in the *Morse case* is fully sustained by the review of that case in *Barron v. Burnside* (121 U. S. 186) to be presently mentioned.

Of the *Doyle case* as a precedent, both as respects the reasoning employed and the conclusions announced, the most that can be said is, that it is an anomaly in our jurisprudence. This characterization is fully justified by the comment thereon in the unanimous opinion rendered in the *Barron case.*

Starting with the assertion that all the court had intended to decide in the *Morse case* was, that an agreement by a corporation to refrain from invoking the jurisdiction of the Federal Courts could neither restrain nor limit that jurisdiction, the prevailing opinion in the *Doyle case* proceeded to consider the power of the states with respect to imposing requirements on foreign corporations, as a condition to their right to do business within their limits. That it recognized the limitation of that power sufficiently appears from the following excerpt:

> "The cases of *Bank of Augusta v. Earle, Ducat v. Chicago, Paul v. Virginia* and *LaFayette Insurance Company v. French* establish the principle that a State may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions, and restrictions it may think proper *that are not repugnant to the Constitution or laws of the United States.*"

As it had already been previously held in the *Morse case* that the identical statute then in question did impose a condition repugnant to the Constitution of the United States, it was seemingly self evident that that statute was of no more effect in determining the rights of parties than as though

it had never been enacted.

Notwithstanding this, the opinion proceeds to consider the right of the state to revoke a license previously granted and assuming the existence of this right, asserts that the motive of its exercise cannot be brought in question.

The difficulty with this argument was that no such question was involved in the case. The state had taken no action revoking the license of the Insurance Company. It had enacted a statute providing in effect that if the corporation exercised its constitutional rights, its license should be revoked and that it should be the duty of one of the administrative officers of the state to carry the statutory mandate into effect.

If the statute were a nullity, there was nothing to which any action of the state could be referable and no sanction for anything done or attempted to be done by any administrative officer of the state thereunder.

Had the decision stopped here, its inherent contradictions would have been so far self-evident as to require little more than their statement. It proceeded however, to consider the abstract question of the right of a foreign corporation to continue doing business in the state, reaching a conclusion expressed as follows:

> "If the state has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made."

Literally therefore, while it was conceded the states had no constitutional power to impose requirements on corporations, *as conditions precedent* to the right to do business within their limits, contravening the Constitution of the United States, such statutes could not only be enacted but made effectual, *as conditions subsequent,* against the corporation in the rightful exercise of the state's power. That the recognition of the latter theory annihilated everything of substance in the former is seemingly self-evident, yet, notwithstanding, both are asserted as fundamental and legally consistent conceptions.

While the prevailing opinion in this case was clearly struggling with the irreconcilable conflict between the theory of absolute power of exclusion with the consequent right of imposing any conditions the state might see fit to impose, and the theory, that any rights assumed to exist in the states were necessarily limited by the Constitution and that no conditions repugnant to the Constitution could be imposed, it must be admitted that the results left the subject in hopeless confusion.

Had the disposition of this uncertainty been left with the decision in the *Barron-Burnside case*, the *Doyle case* could have been dismissed from consideration as wholly opposed to the established principles of constitutional jurisprudence.

It is undeniable that the *Barron case* restored the law as enunciated in the *Morse case* and expressly repudiated anything in any wise tending to limit or qualify the reasoning of that case. It is also

undeniable that the *Barron case* was accepted, as settling any controversy with respect to the power of the states to impose unconstitutional requirements on foreign corporations, until the entire controversy was reopened and the discarded doctrine of the *Doyle case* resurrected by the majority opinion in the *Prewitt case.*

It would unduly extend the present brief to discuss the latter opinion in detail. The dissenting opinion rendered by Mr. Justice Day leaves little to be added. It is however, desired to briefly allude to certain features which have apparently failed to receive sufficient emphasis or attention.

In considering the *Morse case* it was said in substance, in the prevailing opinion that the rule there announced was rested on the circumstance the state *had required an agreement or stipulation in advance* that the corporation would not remove a cause to the Federal Court. It was conceded that a statute imposing any such condition was unconstitutional and void and this was said to have been the basis of the decision in the *Barron* and *Denton cases.* The doctrine thus settled was held not to cover the case of *an independent statute* of a state, providing that if a removal of a cause were had contrary to its terms, the license of the corporation should be revoked.

This was pointed out as the distinguishing feature of these cases notwithstanding *the statute involved in the Doyle case required the agreement or stipulation in advance,* in fact, was the identical statute before the court in the *Morse case,* as al-

ready stated. In the entire argument aimed at reconciling the *Morse* and *Doyle cases*, the circumstance last indicated appears to have been wholly overlooked.

In commenting on the *Barron case*, the prevailing opinion was at pains to emphasize not only the fact that the statute there in question exacted a stipulation in advance, within the meaning of the rule already indicated, but also that the corporation there involved, was one engaged in interstate commerce and hence governed by entirely different principles from those controlling in cases of corporations of the character involved in the *Morse* and *Doyle cases*.

It is significant that, in the *Barron case*, the opinion in which was rendered by an undivided court, the court was at pains to *wholly exclude any effect from the circumstance that the corporation in question was engaged in interstate commerce*, as will appear from the following:

> "The question as to the right of a state to impose upon a corporation engaged in interstate commerce the duty of obtaining a permit from the state, as a condition of its right to carry on such commerce, *is a question which it is not necessary to decide in this case*. In all the cases in which this court has considered the subject of the granting by a state to *a foreign corporation* of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States."

It is further significant that every case cited by the court on the proposition last stated was one

dealing with a non-commercial corporation. Hence, the assertion that the conclusions of the *Barron case* were in any wise controlled by the circumstance the particular corporation there involved was engaged in interstate commerce, is wholly without justification.

The assumption that the conclusion in the *Barron case* was rested on the circumstance the statute there involved required an agreement or stipulation in advance is equally unjustified.

The opinion, as already stated, was at pains to differentiate the consideration of *the effect of the agreement* and that of *the constitutionality of the statute* as impairing the ordinary right of recourse to the Federal Courts.

In the light of subsequent decisions, it requires no argument to demonstrate that that right is as effectually impaired by attaching to its exercise the penalty of forfeiture of the privilege of doing business, and other penalties, as by the requirement of a stipulation or agreement to refrain from exercising the privilege in advance.

That the opinion proceeded on the effect of the inhibition contained in the statute rather than the requirement of the stipulation, is sufficiently indicated from the following, wherein after referring to the *Morse* and *Doyle cases*, the court say:

> "As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured by it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void" (121 U. S. 186, 200).

There is no reasonable room for doubt, taking the opinion in its entirety, that the reference thus made to the "permit" in the context, proceeded from the employment of the same terms as those used in the statute itself. As thus used, it is clear the term was equivalent to license and where the license or the condition attached to its issuance contemplated the surrender of a right guaranteed under the Federal Constitution and laws, the statute imposing such condition would be held void.

Any other construction of the opinion is clearly opposed to the main principle which the court was at pains to expound viz: that a state could not impose as a condition to doing business within its limits, on any corporation, the *surrender of a constitutional right.*

The assumption that the state may impose such unconstitutional requirements only provided it does not exact an agreement from the corporation in advance is practically destructive of the entire constitutional principle involved. The state may accomplish the same result, without, as well as with the agreement and thus the vital effect of the constitutional limitation is surrendered to a matter of largely meaningless form.

The remaining argument advanced in the prevailing opinion in the *Prewitt case* to which it is desired to direct attention is, in substance, that the power of absolute exclusion by a state, of foreign corporations from doing business therein, necessarily presupposes the existence of the power to impose any conditions it sees fit and therefore to

override at discretion, the Constitution of the United States.

The dissenting opinion of Mr. Justice Day in this case read in connection with the prevailing opinion of Mr. Justice Harlan, and the concurring opinion of the present Chief Justice in the *Western Union* and *Ludwig cases*, apparently exclude the acceptance of any such theory at the present time. Notwithstanding, the prevailing opinion in the *Prewitt case* assumed this had always been the law, as applied to non-commercial corporations, as correctly expounded in the *Doyle case*.

The failure to overrule these cases, while distinctly and emphatically repudiating practically every principle upon which they are rested has served to leave them as it were, in a state of suspended animation.

In discussing the theory proceeding from the absolute power of exclusion, it seems to have been gratuitously assumed, rather than analytically demonstrated, that this power carries with it, as a necessary incident, the right of imposing any condition which the state sees fit, regardless of constitutional limitations. The argument on the other side has, as it seems to us, been unnecessarily directed at establishing that this absolute power does not exist; on the contrary, that any such power as the states may exercise in this behalf is necessarily limited by constitutional mandates.

The former conclusion is *non sequitur*, as it is self evident *the absolute power of excluding* foreign corporations may be admitted, without the neces-

sity of conceding that this carries by necessary implication, the right of imposing any conditions whatsoever on the right of admission.

This was clearly indicated in the dissenting opinion of Mr. Justice Bradley in the *Doyle case* as follows:

> "The argument used, that the greater always includes the less, and, therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say, that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property."

The latter conclusion addressed at showing *a limitation on the power of exclusion is* seemingly unnecessary. As already shown in the excerpt above quoted from the *Morse case*, it was clearly recognized that the state could always exercise its power of exclusion, with respect to corporations whose right of entry could not be predicated of constitutional considerations.

The question then, is not as to *any limitation on the power of exclusion* but rather that of limitation on *the power of admission.*

We may then paraphrase what is conceived to be the correct rule. *The state may exclude the corporation but it cannot bar the Federal Constitution.* If it admits the corporation, it perforce admits the Constitution, anything in its laws to the contrary notwithstanding.

In no other way can it be postulated that the Fed-

eral Constitution and laws constitute the supreme law of the land.

We need not pause to inquire under what circumstances, a state, in the exercise of its constitutional powers, may revoke a license previously granted to a corporation which has entered its borders, invested its capital and established itself therein. The right to exercise any such power, if it shall be brought in question, would, perforce be determined by considerations wholly foreign to anything with which we have presently to deal. The only question with which we are presently concerned has to deal with the State's exacting as the price of admission, the surrender of privileges guaranteed by the Federal Constitution. We agree with the conclusions of the present Chief Justice and Mr. Justice Day in the cases above cited, that that price cannot be violative of the law of the land, and this regardless of the nature or character of the business in which the corporation is engaged.

In conclusion on the question under discussion, attention may be directed to the recent decision of *Phoenix Insurance Company v. McMasters*, 237 U. S. 63-71-72, in which it was stated as follows:

> "It was within the power of the State, so long as it did not impose upon the company as a condition of doing business within the State any deprivation of rights secured to it under the Federal Constitution, to determine for itself the conditions upon which such foreign corporation could do business within the State. This principle has been often affirmed by the decision of this court, and the Insurance Company, being within that class of companies not doing an interstate business, the State might,

> in the exercise of its lawful authority, exclude it from doing business within the State, so long as no rights conferred by the Constitution and laws of the United States were destroyed or abridged" (pp. 71-72. Citing the *Harrison case*).

This was said with reference to the power of a state in dealing with a non-commercial corporation and seemingly removes the last vestige of support for the *Doyle* and *Prewitt cases*.

V.

CONCLUSION.

In view of the fact that the unconstitutionality of the legislation in question may be so clearly demonstrated on the grounds already considered, it has been deemed unnecessary to lay particular emphasis on certain features differentiating the instant case from several of the cases in general where similar questions have arisen. It should be noted, however, that upon the allegations of the Bill, admitted by the Answer, appellee entered the State of Wisconsin and established itself therein prior to the enactment of any legislation by the State of Wisconsin prescribing conditions upon which foreign corporations in general should do business in that State.

Under these conditions, as stated in several of the cases already reviewed, the right of the State upon any theory of the law was materially different from that which would have existed in the case of a cor-

poration applying for admission in the first instance.

As said in the *Herndon case, supra:*

> "Moreover, this is not a case where the State has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. The corporation was within the State, complying with its laws, and had acquired, under the sanction of the State, a large amount of property within its borders, and thus had become a person within the State within the meaning of the Constitution, and entitled to its protection."

Whatever authority may be otherwise assumed to have existed in the State, any attempt on its part as to a corporation thus situated to impose discriminatory or otherwise unconstitutional exactions as a condition to its continuing its business therein, can find no sanction in the decided cases. This was so fully covered by the court in *Southern Railway Company v. Greene*, 216 U. S. 400-413 as to require no further argument.

We need not discuss to what extent an implied contract, between the State and a corporation entering its limits under the circumstances thus indicated, may be held to arise, with the consequent freedom of that contract from impairment under the Constitution or whether the arbitrary forfeiture of the privilege of doing business, in the manner provided by the statute's terms would constitute a deprivation of property without due process.

These questions, however, were quite fully discussed by this Court in *American Smelting and Refining Company v. Colorado,* 204 U. S. 103. They

were also considered in *Western Union Telegraph Company v. Julian, supra.*

In the concurring opinion of the present Chief Justice in the *Kansas case,* 216 U. S., p. 50, the following pertinent statement appears:

> "This cause is concerned, not with the power of the State to prevent a corporation from coming in for the purpose of doing local business and to attach conditions to the privilege of so coming in, but involves the right of the State to confiscate the property of the corporation already within the State and which has been there for years, devoted to the doing of local business as the result of the implied invitation or tacit consent of the State arising from its failure to forbid or to regulate the coming in. In other words, this case involves determining not how far a State may arbitrarily exclude, but to what extent, after allowing a corporation to come in and acquire property, a State may take its property within the State without compensation upon the theory that the corporation is not in the State and has no property right therein which is not subject to confiscation. * * * The investment is there, and its magnitude, it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired, that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned."

The contrary argument addressed at showing that, under such statutes, no unconstitutional exaction arises for the reason that the whole subject is made to turn on the voluntary action or election

of the corporation itself, is best answered by further excerpt from the opinion last above quoted:

> "What possible election can there be? The property is in the State. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place."

The excerpts last above quoted indicate the practical features of the question and the danger of admitting to the states any right of imposing unconstitutional burdens as a condition to the privilege of doing business within their limits.

It will be observed that the argument thus far advanced has admitted, at least as applied to non commercial organizations, the absolute power of exclusion. It also presupposes the right of imposing conditions on the exercise of a privilege at discretion, provided only those conditions are not violative of rights secured by the Constitution and laws of the United States. Subject to the same limitations, the general law of the state applicable to its own corporations may be made effective with respect to foreign corporations domiciled therein. And of course there is no attempt in anything herein contended for to curtail the right of exercise of the ordinary powers of police.

All that is contended for is that in whatever form the exercise of the power may manifest itself, it must be subordinated to the supreme law of the

land and that no exceptions may be engrafted which permit of either the evasion or overriding of that law under any circumstances or conditions whatsoever. Certain attributes are necessarily attached to corporate existence by virtue of the Constitution of the United States. Those attributes follow the corporation wheresoever and under whatever conditions it may exercise its corporate functions. Derived from a source independent of, and superior to, any power of the state, they may not be qualified, limited or impaired by any lesser power than that to which they owe their origin.

Stated broadly, the position for which we contend is, that it is logically impossible to assume that there may be a divestiture of rights guaranteed by the Constitution and laws of the United States without denying the supremacy of that law. The assumption therefore, that such divestiture may be accomplished by any form of state action whatsoever, is an anomaly in our constitutional jurisprudence. The application of this broad and salutary rule will discard the technical and largely meaningless distinctions with which the subject has been hedged about and restore the original and uniform conception of constitutional interpretation.

These reasons necessarily lead to the affirmance of the order appealed from.

Respectfully submitted,

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Minneapolis, Minnesota.

24

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 254.

JAMES A. FREAR, IN HIS CAPACITY AS SECRETARY OF STATE OF THE STATE OF WISCONSIN, APPELLANT,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED SEPTEMBER 26, 1914.

(24,381)

(24,381)

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INDEX.

	Original.	Print
Caption	1	1
Bill of complaint	4	2
Motion for injunction	27	14
Subpœna	29	14
Memorandum	30	15
Return on subpœna	31	15
Interlocutory restraining order	32	16
Appearance of defendant	34	17
Demurrer	35	17
Orders for argument on demurrer	37	18
Opinion, Kohlsaat, J.	38	19
Interlocutory injunction	48	24
Petition for and order allowing appeal	51	25
Assignment of errors	53	26
Bond on appeal	55	27
Præcipe for transcript of record	57	28
Clerk's certificate	58	29
Citation and service	59	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 11, 1915.

1 United States District Court, Western District of Wisconsin.

117-A, Civil Docket.

WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
JAMES A. FREAR, in His Capacity as Secretary of State of the State of Wisconsin, Defendant.

A. G. Zimmerman and Rufus B. Smith, of Madison, Wisconsin, and Percy B. Eckhart of Chicago, Illinois, solicitors for complainant.
Walter C. Owen, Attorney General of the State of Wisconsin, and J. E. Messerschmidt, Assistant Attorney General, Madison, Wisconsin, solicitors for defendant.

2 District Court of the United States for the Western District of Wisconsin.

At the term of the District Court of the United States of America for the Western District of Wisconsin begun and held at the city of Madison in said District on the 13th day of March, A. D. 1912, present and presiding the Honorable Arthur L. Sanborn, Judge, among other, the following proceedings were had, to-wit:

3 District Court of the United States, Western District of Wisconsin.

117–A, C. Dk.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
JAMES A. FREAR, in His Capacity as Secretary of State of the State of Wisconsin, Defendant.

Be it remembered, that heretofore, to-wit, on the 13th day of March, A. D. 1912, came The Western Union Telegraph Company by Messrs. A. G. Zimmerman and Rufus B. Smith, its solicitors, and filed in the office of the Clerk of the District Court of the United States for the Western District of Wisconsin, its bill of complaint, in words and figures following, to-wit:

4 In the District Court of the United States for the Western District of Wisconsin.

WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
JAMES A. FREAR, in His Capacity as Secretary of State of the State of Wisconsin, Defendant.

To the Honorable the Judge of the District Court of the United States for the Western District of Wisconsin:

The Western Union Telegraph Company, a corporation created and organized under the laws of the State of New York, and a citizen of said State of New York, having its principal place of business in the City of New York, in the State of New York, brings this, its bill of complaint against James A. Frear as Secretary of State of the State of Wisconsin, who is a citizen of the State of Wisconsin, and as a basis therefor states and shows the following facts:

Section I.

Your orator, the Western Union Telegraph Company, is a corporation created and organized under an act of the legislature of the State of New York entitled "An Act to Provide for the Incorporating and Regulating of Telegraph Companies," approved on the
5 12th day of April, 1848, with full corporate powers and capacity to do and perform all of the acts and to acquire and own all of the properties in this bill of complaint referred to; and is a citizen of the State of New York, with its principal place of business in the City of New York, in the State of New York.

(*a*) Your orator further states and shows, that the Congress of the United States passed an act, approved July 24, 1866, entitled, "An Act to Aid in the Construction of the Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes;" that by a further act of Congress, approved June 10, 1872, entitled, "An Act Making Appropriation for Sundry Civil Expenses of the Government for the Fiscal Year Ending June 30, 1873, and for Other Purposes;" all telegraph companies accepting the provisions of the act approved July 24, 1866, were required to transmit for the Secretary of War of the United States the results of observations at signal stations and reports for the Weather Bureau Department for the Government of the United States, under severe penalties fixed and defined by said act last named.

(*b*) Your orator further states, that complying with the provisions of said act of Congress, approved July 24, 1866, it did, on or about the 8th day of June, 1867, duly file with the Postmaster General of the United States its written acceptance of all the restrictions and obligations of the said act, and thereupon your orator became entitled to all the rights and privileges conferred by said act, and burdened with all the obligations imposed by said act, and that it has, at all times since the filing of said acceptance, fully performed all

obligations and requirements of said act, and has, as part of
6 the postal equipment of the United States and an instrumentality of the Postal Department of the United States, carried upon its lines of telegraph messages for the Government of the United States, for the several departments thereof, and for the people of the United States and of the State of Wisconsin, as prescribed and required in and by the provisions of said act.

(*c*) Your orator further says, that it was organized as a telegraph company in the year 1851, and immediately thereafter began the work of construction and operation of telegraph lines in the State of New York and other States, and has continuously since that time been engaged in the work of constructing and operating telegraph lines for the rapid dissemination of intelligence, and has constructed and acquired a continuous system of telegraph lines which now extend through the States and Territories of the United States, and into the borders of the Dominion of Canada, and connect with telegraph lines in the Republic of Mexico, and through the said lines of Mexico, with the telegraph lines of the Central and South American Republics; and also connect by means of submarine cables with the telegraph systems of foreign countries; that at the present time its said system of telegraph lines, operated and controlled by it as aforesaid, comprises over 219,000 miles of poles and cables, and over 1,400,000 miles of wire; that upon the said system of telegraph lines your orator has over 24,900 offices, and transmits yearly about 70,000,000 messages, for the public and for the government of the United States and for the governments of foreign countries, exclusive of messages for your orator, and exclusive also of messages forwarded by private parties leasing wires from your orator; that the said system of lines has been built up so as to connect with
7 and be largely operated from the central office of your orator, which is situated in the City of New York, and the said lines radiate therefrom to all the important cities and commercial centres and to many thousand towns and villages in the United States and North America, and through ocean cables, and land lines above described, to all the important commercial centres of this country and the continent of Europe, and through lines there situated with the telegraph forming a component part of the said system of your orator, and connected with its main office aforesaid, in the City of New York, are telegraph lines within the State of Wisconsin, most of which lines have been constructed in said State since the acceptance by your orator of the terms and conditions of said act of Congress approved July 24, 1866.

(*d*) That the complainant's said lines of telegraph within the State of Wisconsin are largely upon the public domain, and upon the military and post roads of the United States; and that the complainant's said lines of telegraph are part of the postal routes and part of the postal establishment of the United States, and as such the complainant has, under the Constitution and laws of the United States, the power, and is under the duty and obligation, to transmit all messages for the government and for the public generally just

as much and as fully with respect to messages between points within the said State as with respect to interstate messages.

(*e*) And complainant states and shows, that in carrying on said business, complainant uses wires, connected with instruments and batteries, for the transmission of messages by electricity, the said wires being supported by poles, carrying cross-arms, firmly
8 set in the ground and stationed at uniform distances for the purpose; and that it was, and is, necessary for complainant to acquire and own real estate, rights-of-way and easements over the lands of others in order to plant its poles to uphold its wires and make the connections necessary for the transmission and receipt of messages by telegraph, and for the establishment of its offices and the general conduct of its business in the public service.

(*f*) Your orator avers, that a large percentage of the people of the State of Wisconsin are dependent upon the facilities maintained and offered to the public by your orator for their telegraphic service to points wholly within, as well as to points beyond, the State of Wisconsin; and that as hereinafter averred, the safe operation of trains by many railroads within the State of Wisconsin is dependent upon the telegraphic service maintained by complainant, under contracts of many years' standing entered into with the several railroads. And complainant shows unto your Honors, that the conditions herein referred to have been in existence for a period of many years.

Section II.

That heretofore, to-wit on the 6th day of December, A. D. 1911, one Walter L. Houser in his capacity as Trustee of the estate of David Blum, bankrupt, a resident of the State of Wisconsin, brought his action against this complainant in the Circuit Court of Dane County, in the State of Wisconsin claiming as damages from the said complainant the sum of Fifteen Thousand Nine Hundred Dollars ($15,900.00) for and on account of an alleged failure upon the part of the said complainant to transmit and deliver a telegram
9 filed at Philadelphia in the State of Pennsylvania to be transmitted to one David Blum at Mondovi in the State of Wisconsin.

Section III.

Complainant avers that it has been advised by counsel and therefore avers, that for the proper presentation of its defense to said action, it should exercise the right of securing the removal of the same to the District Court of the United States, as authorized by the constitution and laws of the United States, and that for the reason assigned the said complainant has caused to be filed in the Circuit Court of Dane County, Wisconsin a petition praying for the removal of the said cause of Walter L. Houser, Trustee therein depending from the said Circuit Court of Dane County, Wisconsin to the District Court of the United States for the Western District of Wisconsin and the Judge of the said Circuit Court of Dane County, Wisconsin has entered an order directing the removal of said cause as prayed

for, the complainant having filed its bond as is required in the case of the removal of actions from a State Court to a Federal Court.

And complainant states and shows that it will be advised to, and will, bring about the removal of other causes filed and about to be filed against it by citizens of Wisconsin in the Courts of the State of Wisconsin above referred to, in the event that such removal is authorized by the constitution and laws of the United States.

10 Section IV.

Your orator further represents and shows that in the year A. D. 1898 the legislature of Wisconsin passed an act, now known as section 1770*b* of statutes of Wisconsin of 1898 providing among other things that no foreign corporation incorporated or organized otherwise than under the laws of the State of Wisconsin should transact any business or acquire, hold or dispose of property in the State of Wisconsin until such corporation shall have filed in the office of the Secretary of State of the State of Wisconsin a duly authenticated copy of its charter and all amendments thereto. That such corporation causing a copy of its charter or articles to be so filed should thereby be deemed to have made, constituted and appointed the Secretary of State its true and lawful attorney upon whom all pleadings or process in any action or proceeding against it might be served arising out of or in respect to any business, contract or transactions in said State and that such stipulation should continue in force so long as any liability of such corporation remain outstanding in such State. And that every such corporation should pay to the Secretary of State twenty-five dollars ($25.00) for filing such articles of incorporation.

That, to-wit upon the 20th day of June, A. D. 1905 the legislature of Wisconsin enacted a law, being chapter 506 of the general laws of Wisconsin for the year 1905 enacting certain new sections to be a part of the statutes of Wisconsin, one of which sections was to be numbered section 1770*f*. Section 1770*f* being in the words and figures following:

11 "Whenever any foreign corporation doing business in this state shall remove or make application to remove into any district or circuit court of the United States any action or proceeding commenced against it by any citizen of this state, upon any claim or cause of action arising within this state, it shall be the duty of the secretary of state, upon such fact being made to appear to him, to revoke the license of such corporation to do business within this state."

Your orator further shows that in the year A. D. 1907 at the request of the Secretary of State and for no other reason, it filed in the office of the Secretary of State of the State of Wisconsin a duly authenticated copy of its charter as required by section 1770*b* and paid to the Secretary of State of the State of Wisconsin the fee of twenty-five dollars ($25.00) as provided by said act. That the said filing of said articles and the payment of the said fee to the Secretary of State as aforesaid was made ex gratia and that your orator at said time did not believe and does not now believe that it was required to file said report or to pay said fee.

Your orator further avers that on the 31st day of December, 1907, the Secretary of State of the State of Wisconsin issued and delivered to your petitioner a license to transact business within the State of Wisconsin and that said license or permit has ever since been in the possession of your petitioner.

Section V.

Your orator further represents and shows that it was organized as a corporation in the year 1851 and that soon thereafter, to-wit, long before the year A. D. 1860 it extended its lines of tele-
12 graph into the State of Wisconsin with the consent and acquiescence of the said state and then commenced and has ever since continued to transact the business of sending by telegram messages both intra-state and interstate messages and that for the purpose of providing for the transaction of its said business it has invested very large sums of money in the State of Wisconsin in and about the construction of lines of telegraph and the establishment of telegraph offices and other expenses incidental thereto. And that the said business has been continuously conducted in said state since its establishment. The complainant further states that by the term of its charter it has perpetual succession and its duration is unlimited and that until the enactment of section 1770*f* of the statutes of Wisconsin hereinbefore referred to there has never been any statute of the State of Wisconsin providing for the expulsion of this corporation from the state of Wisconsin or the revocation of its right to do business in Wisconsin for removing any suit to the Federal Courts or for exercising any other rights secured to it by the constitution and laws of the United States or of the State of Wisconsin nor any provision whatever for revoking the right of this corporation to do business in the State of Wisconsin.

Section VI.

Complainant further states that in order to conduct its said business it has been and is necessary for complainant to acquire, own or control rights-of-way or easements over land in the State of Wisconsin and to enter into contracts and make leases with reference to buildings in which to do business and to have and maintain
13 offices in said State for the transaction of its said business and to have one or more agents at each of said offices; and that complainant has a large number of offices over the State of Wisconsin to the number of over seven hundred and twenty-five (725). Complainant has acquired rights-of-way and easements and franchises and has made leases and contracts and has acquired and established the properties above referred to in reliance upon and under and by virtue of the laws of Wisconsin in force prior to the said act of 1905 and under and in pursuance of a well established policy in Wisconsin, as indicated by its constitution and statutes, encouraging corporations not organized under the laws of Wisconsin to come into said state and do business and acquire property rights in said state, under general laws applicable to complainant, said enactments not

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in terms or by implication in any wise limiting such privilege, contract or franchise in point of time.

The said lines of telegraph existing in said State of Wisconsin and hereinbefore described, have been constructed by your orator as aforesaid, with the consent and permission of said state and in accordance with its laws, and your orator has invested in the said lines of telegraph now in said state, large sums of money, in excess of several hundred thousand dollars; and that continuously since the construction of said lines of telegraph your orator has used the said lines for the transmission of telegraph messages for the government of the United States, and the several departments thereof, and for the public, as an instrumentality of the Postal Department, and of commerce wholly within the State of Wisconsin, and also for interstate commerce, and commerce between points in said state
14 and foreign countries, and thus said telegraph lines have been continuously employed in domestic, interstate and foreign commerce since their construction.

Section VII.

Complainant avers that this case is wholly between citizens of different states and that the subject matter thereof, and the amount in controversy is of the value of more than ten thousand dollars ($10,000.00) exclusive of interest and costs, and is also one arising under the constitution and laws of the United States, in that your orator, the Western Union Telegraph Company asserts its rights and privileges under acts of Congress, and the constitution and laws of the United States against the said defendant.

Section VIII.

Complainant states that by reason of its compliance with the constitution and laws of the State of Wisconsin, as aforesaid, and its having paid the said fee to carry on and do business as authorized by the said act of the legislature hereinbefore referred to and having complied with the laws of Wisconsin in the respects and under the circumstances hereinbefore set out, a valid and subsisting contract was thus made and entered into, and for a valuable consideration by and between complainant and the State of Wisconsin whereby complainant was fully authorized and empowered to do and to carry on its said business between points in Wisconsin, without being subject to any greater burden or liabilities, or restrictions, or conditions, than were then imposed by the terms of said contract, upon
15 complainant, so far, at least, as its right to do business in Wisconsin is concerned for and during the term of corporate existence.

And complainant is advised and informed and believes, and upon such information and belief, avers that the said act of the legislature of Wisconsin forbidding this complainant to exercise its right under the constitution and laws of the United States to remove causes from the State Courts of Wisconsin to the Federal Courts and seeking to

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authorize the cancellation of its right to do business in the State of Wisconsin, if it exercises such right, impairs the obligation of the said contract theretofore made and then and now existing between the complainant and the State of Wisconsin above mentioned, and said act, or statute in so far as it undertakes to provide a forfeiture and revocation of complainant's right to do business within the State of Wisconsin as a telegraph company, is violative of section 10 of article 1 of the constitution of the United States, and is therefore null and void.

Section IX.

Complainant further states and shows that in addition to the regular commercial business in which its wires and instruments are used, as aforesaid, it has contracts, which have been in existence for several years, and in some cases, for many years, with various railroad companies doing an intrastate and an interstate business in Wisconsin, and under said contracts the said railroad companies have the right to use one or more of the wires of complainant, which are, by the terms thereof, to be maintained and kept in order *are*
replaced by complainant, for the purpose of handling the
16 trains of such railroad companies and directing the movement of such trains; that the use of the wires by the railroad companies, as aforesaid, is for the purpose, among other, of directing the movement of trains within the State of Wisconsin, on the tracks of the several railroad companies with which complainant has contracts.

And complainant avers, that if the license, or permit, of complainant to do business in this State be cancelled, it will not only entail the damage, annoyance, inconvenience and injury herein set out, but would, if enforced, result in an inability on part of complainant to comply with said contracts with the several railroad companies, aforesaid, and prevent the handling of trains upon such roads by means of the telegraph and subject complainant to grave suits for the non-performance of its obligations thereunder. And complainant shows and states, that it is absolutely necessary for said railroad companies to use the telegraph for the safe and orderly and proper handling of their trains in performance of the duty imposed upon them by law, and to prevent collisions between trains; and, further that if deprived of complainant's services by the enforcement of the statute complained of, it would require many months for the railroad companies of Wisconsin to install other telegraphic systems for the handling of their trains within the State of Wisconsin, wherefore complainant avers that if the revocation of its license is enforced by the State of Wisconsin, or by the defendant, as a ministerial officer, not only will your orator be deprived of the property rights acquired by it in reliance upon the express invitation and admission
of your orator by the State of Wisconsin, but, in addition, the
17 obligation of and ability to perform valid contracts, involving services of paramount necessity to the people of the State of Wisconsin, will be impaired or destroyed, and your orator will be denied the resort to those tribunals which it had the right to resort

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to for the enforcement of its contract rights: with special reference to which your orator assumed the burdens and obligations of said contracts.

And in further support of the relief hereinafter prayed, your orator states and shows that many of the contracts entered into by your orator, involving interstate commerce, upon which suits are brought in cour-s of the State of Wisconsin, involve terms which are construed by the courts of Wisconsin materially at a variance from the construction placed thereon by the courts of the States where the same were entered into, with reference to which your orator entered into said contracts, and materially at a variance from the construction placed thereon by the courts of the United States; wherefore complainant avers that the attempted forfeiture of its license for the removal of cases involving interstate commerce, under the circumstances averred, is, in effect, the impairment of the obligations of contracts over which the State of Wisconsin has no control and deprives complainant of the equal protection of the laws and confiscates its property without compensation, or due process.

Section X.

Your orator avers, that if this complainant is deprived of the right to do intra-state business within the State of Wisconsin it will be unable to carry out the obligations required of it by the Congress of the United States, as hereinabove set out, and will be unable
18 to carry on its interstate business so far as the State of Wisconsin is concerned, for the reason that the interstate and federal business done by complainant will not enable it to earn a reasonable return on complainant's investment within the State of Wisconsin.

Section XI.

The constitution of the State of Wisconsin now in force provides in section 9 of article 1:

"Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, comformable to the laws."

The Complainant avers that the said Act of 1905 known as section 1770*f* of the statutes of Wisconsin attempting to prohibit or prevent complainant or other foreign corporations lawfully doing business in Wisconsin from exercising their legal right to remove a suit brought in one of the courts of the State to a Federal Court under penalty of a forfeiture or revocation of their right or license to do an intra-state business in Wisconsin is violative of the said section of the constitution of the State of Wisconsin and is therefore null and void.

Section XII.

Complainant further states, that the said act, which has for its purpose the prevention of the removal of suits from a State Court into

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a Federal Court by corporations organized under the laws of another State than Wisconsin, by declaring a forfeiture or revocation, or authorizing the Secretary of State to declare such forfeiture or
19 revocation, of the right, or license, of such corporation to do an intra-state business within the State of Wisconsin, after complainant has invested its means and acquired properties in said State, for the purpose of doing, or operating, said telegraph business, both within the State and between points in Wisconsin and points outside of Wisconsin, and has been engaged in such business of a telegraph company for many years, as aforesaid, under and by virtue of the laws of the State of Wisconsin and by virtue of the invitation thereby extended to complainant, and when such forfeiture or revocation of its rights, or license, would be to destroy the value of its said properties and render them practically useless for the purposes for which they were designated, and have been, and are, used, and after a compliance on the part of complainant with the Constitution and laws of the State of Wisconsin, and after obtaining and paying for an unlimited license to do business therein, as aforesaid, deprives complainant of its property and the legitimate use thereof, so far, at least, as all business classed as intra-state business is concerned, without due process of law, and denies to it the equal protection of the laws, in violation of Sec. 1, Article 14, of the Amendments to the Constitution of the United States, and is therefore null and void as to this complainant.

Your orator shows that the cost of taking down and removing its wires and instruments and movable properties from the State of Wisconsin, without compensation, would exceed in amount the value of the materials so removed; and that under the laws of the State of Wisconsin, no person or domestic corporation is in any wise
20 prohibited or deterred from removing causes to the Federal Courts of the United States whenever the Constitution and laws of the United States permit such removal, wherefore, under the circumstances averred in this bill, the penalty sought to be imposed on complainant by the statute in question is plainly discriminatory and void.

And your orator further states, that the attempted cancellation of the license to do business within the State of Wisconsin imposed by said Act is, upon its face, not a bona fide exercise by the State of Wisconsin of its general right to exclude foreign corporations from doing business wholly within its confines for the reason that all foreign corporations are to be readmitted automatically and immediately by general laws; and the effect of the cancellation and immediate re-issue of a license, upon payment of the admission fee, can be regarded by this court, not as an attempt to exclude complainant but merely as the imposition of a penalty or fine for the exercise of a right secured to complainant by the Constitution and laws of the United States, wherefore complainant avers that the Act viewed with reference to all of the system of laws of the State of Wisconsin, is, in purpose and effect, naught but a denial of valid federal provisions and is therefore null and void as to this complainant.

And complainant further alleges that the State of Wisconsin, hav-

ing admitted it to do business within the State under certain terms and provisions in its statutes, with which complainant has complied prior to the said Act of 1905, cannot lawfully deprive it of the right secured by the Statutes of the United States to remove suits from a State Court into a Federal Court, as is sought to be done by the said Act of 1905.

21 Section XIII.

Your orator avers that it is advised that the said statute of the State of Wisconsin, to-wit, section 1770*f* above referred to is unconstitutional and void in so far as the same directs or attempts to direct the annulment of complainant's right to do business within the State of Wisconsin upon the removal by complainant of an action to the Federal Court, where authorized by the constitution and laws of the United States, but your orator avers that the defendant under color of said act, is about to carry out its provisions and cause the cancellation of the complainant's permit, whereupon the said complainant will be subjected to heavy penalties and forfeitures, and that every contract made by or on behalf of the complainant will be denounced as wholly void on its behalf and on behalf of its assigns but will be enforce-able against it or them; that by reason of such attempted cancellation complainant's business would be impaired or destroyed, its ability to contract jeopardized, and its property rights diminished, and that moreover complainant will be interfered with and prevented from carrying out or enforcing, or suing upon, its valid contracts, and from collecting large sums due it in said State and will be prevented from performing those services for the Government of the United States with which it is charged; and will, in addition, be prevented from carrying on its interstate business over which the State of Wisconsin has no direct control, unless this defendant, and such others as may attempt, under color of said act, to bright about the annulment of complainant's franchise to do business within the State of Wisconsin, are enjoined by this Court; wherefore, complainant avers, that without the aid of this Court, it will be subjected to irreparable injury and damage.

22 Your orator further states that the liquidation of the penalties to which complainant, its servants and agents, will be subjected by the rescission of its license to do business in Wisconsin, and the litigation to which complainant will be subjected, in the endeavor to enforce and comply with its contracts and public duties in the State of Wisconsin, in spite of said statute of outlawry, will subject it to a multiplicity of suits, all depending upon one single cardinal question of law: viz, the constitutionality of the act above referred to and its legality as applied to this complainant; wherefore, complainant avers that it is remediless at law and can have relief nowhere save in a court exercising chancery jurisdiction, and that this court has jurisdiction to determine the single question of law which will be decisive of all of the threatened actions, thereby preventing a multiplicity of suits, involving great and unnecessary expense to your orator, and thereby avoiding the loss and injury to which your orator would, without the aid of this court, be unjustly subjected.

Your orator further states that the defendant as such Secretary of State has announced that he will within a certain short period of time proceed to revoke the said license of your orator to do business in the State of Wisconsin as is in terms provided by section 1770*f* of the statutes of Wisconsin.

Prayer.

In consideration whereof, and forasmuch as complainant is without remedy in the premises at law and can have adequate relief only in a court of equity where matters of this nature are properly
23 cognizable and relievable, and to the end that the defendant herein named and such others as it may become necessary to join as parties defendant to this bill, may answer the several matters and things hereinbefore set forth as fully and particularly as if the same were here again repeated and he and they were hereunto interrogated, complainant prays that an order may be made by this Honorable Court, enjoining and restraining the said defendant and his successors in person or by deputy or assistant from cancelling or revoking the license or permit of the complainant to do business in the State of Wisconsin or from taking any action or causing any action to be taken against the complainant for or on account of its alleged violation or of any similar violation of the said act of the legislature of Wisconsin declaring or purporting to declare the license or permit of complainant to do business within the State of Wisconsin forfeited on account of the said removal of a cause from the State Court of said State to the Federal Court, and from making any entry of record in person or by deputy or assistant which would purport to cancel the said permit to do business in this State, or from making and entering any order that the permit of the complainant was cancelled as was provided for by section 1770*f* of the Revised Statutes of Wisconsin.

And that in the meantime, and until a decision can be had upon complainant's motion for the injunction herein prayed for, a temporary order be immediately granted, restraining and enjoining the defendant as aforesaid, and complainant avers that there is danger of irreparable injury from delay, if action should not be taken until said motion for an injunction can be heard and determined.

Your orator further prays that your Honor will, by inter-
24 locutory order or decree, authorize complainant to amend this original bill if so advised, or necessary, by adding any other party or parties thereto who may be properly added in order to effectuate the relief herein prayed.

Complainant further prays that on the final hearing of this cause the said injunction and restraining order be made perpetual and that this court will further decree that the said provisions of said Act forfeiting the right or license of the complainant to do business within the State of Wisconsin or to do intra-state business on account of the removal by complainant of said cause, shall be declared violative of the constitution of the State of Wisconsin and therefore null and void as to this complainant, and shall be declared violative of the constitution of the United States and therefore null and void as to this complainant.

And complainant prays that your Honorable Court will grant to it such other and further relief in the premises as in equity and good conscience it may appear to be entitled to under the facts of the case.

And may it please your Honors to grant to complainant the temporary restraining order, as aforesaid, the writ of injunction aforesaid, and the most gracious writ of subpœna against the said defendant, the said James A. Frear, as the Secretary of State of the State of Wisconsin in his official capacity as aforesaid, commanding the said defendant under a penalty to be fixed therefor, to appear in this court on some certain day to be therein named to answer the premises and to abide by and perform such a decree as may be made therein; but said answers need not be made under oath, as answers under oath are hereby waived.

25 This bill of complaint is filed under the corporate authority of the complainant.

This is the first and only application for a restraining order or an injunction in this case.

WESTERN UNION TELEGRAPH COMPANY,
By A. G. ZIMMERMAN AND
RUFUS B. SMITH,
Solicitors for Complainant.

GEO. H. FEARONS,
Gen. Att'y, etc., of Counsel.

STATE OF WISCONSIN,
Dane County, ss:

Personally appeared before me the undersigned, a notary public, in and for the county of Dane in the State of Wisconsin, William H. Murray, who being duly sworn deposes and says: That he is the manager and agent of the Western Union Telegraph Company, the complainant in the foregoing bill, at Madison, Wisconsin, and as such is fully authorized to make this affidavit on its behalf. That he has read the foregoing bill and knows the contents thereof. That the facts therein stated as of complainant's own knowledge are true, and that the facts stated therein as of complainant's information and belief, he is informed are as therein stated, and that he verily believes the same to be true.

WILLIAM H. MURRAY, *Mgr.*

Sworn to and subscribed before me this 11th day of March, A. D. 1912.

[L. S.] RUFUS B. SMITH,
Notary Public, Dane County, Wisconsin.

26 Endorsed: 117-A Civil Docket. Western District of Wisconsin, U. S. District Court. Western Union Telegraph Company, complainant, vs. James A. Frear as Secretary of State, &c., defendant. Bill. Filed Mar. 13, 1912. F. W. Oakley, Clerk. A. G. Zimmerman and Rufus B. Smith, Madison, Wis., solicitors for compl't.

27 Whereupon on same day, to-wit, March 13, 1912, filed motion for temporary injunction, as follows:

In the District Court of the United States for the Western District of Wisconsin.

WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
JAMES A. FREAR, in His Capacity as Secretary of State of the State of Wisconsin, Defendant.

The complainant having filed its bill against the said defendant to permanently enjoin and restrain the said defendant from revoking the license of the Western Union Telegraph Company to do business within the State of Wisconsin for the alleged reason that the said complainant removed from the Circuit Court of Dane County to the United States District Court for the Western District of Wisconsin, a cause commenced in said Dane County Circuit Court by Walter Houser a Trustee against the complainant.

The complainant by its solicitors, A. G. Zimmerman and Rufus B. Smith now moves your Honors for an interlocutory injunction or restraining order restraining the defendant in his capacity as Secretary of State of the State of Wisconsin from revoking the license of the Western Union Telegraph Company to do business within the State of Wisconsin and from taking any step in the matter of
28 the revocation of such license or from making any record either in person or by deputy or by assistant in the matter of such revocation until the final determination of this cause by said Court.

A. G. ZIMMERMAN AND
RUFUS B. SMITH,
Solicitors for Complainant.

Endorsed: 117A—Civil Docket. Western District of Wisconsin. U. S. District Court. Western Union Telegraph Company, Complainant, vs. James A. Frear, as Secretary of State, etc., Defendant. Motion for temporary injunction. Filed Mar. 13, 1912. F. W. Oakley, Clerk. A. G. Zimmerman & Rufus B. Smith, Solicitors for Complainant, Madison, Wis.

29 Afterwards, to-wit, March 15, 1912, subpœna issued as follows:

THE UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

The President of the United States of America to James A. Frear, in his capacity as Secretary of State of the State of Wisconsin, Greeting:

You are hereby commanded, That you personally appear before the Judges of the District Court of the United States of America, for

the Western District of Wisconsin, in our Court of Chancery, in and for the District aforesaid, on the first Monday of May, 1912, next ensuing, at Madison, to answer to a bill of complaint exhibited against you in our said Court, by Western Union Telegraph Company.

And to do further, and receive what our said court shall have considered in that behalf, and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the Marshal of this District, who is hereby commanded to serve the same upon the said James A. Frear in his capacity as Secretary of State of the State of Wisconsin if to be found in his District, and due return thereof make.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at the City of Madison in the said District this 15th day of March in the year of our Lord one thousand nine hundred and twelve, and of our Independence the one hundred and thirty-six.

F. W. OAKLEY, *Clerk.* [L. S.]

A. G. ZIMMERMAN AND
RUFUS B. SMITH,
Attorneys for Complainant, Madison, Wis.

30 It is ordered by our said court that the said James A. Frear in his capacity as Secretary of State of the State of Wisconsin, the defendant aforesaid, do enter his appearance in this suit, in the Clerk's office, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise the bill filed may be taken as confessed. And it is further ordered that you show cause by Monday the 15th day of April, 1912, at ten o'clock in the forenoon, why an injunction should not be issued, and a receiver be appointed, according to the prayer of the bill on file.

[L. S.] F. W. OAKLEY, *Clerk.*

31 Afterwards said subpœna was returned served as follows:

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I hereby certify and return that on this fifteenth day of March, 1912, at Madison, in Dane County, Western District of Wisconsin, I served this chancery subpœna on the within named James A. Frear, personally, in his capacity as Secretary of State of the State of Wisconsin, and delivered to him a true copy thereof.

I further certify and return that at the same time and place I delivered to said James A. Frear, personally, in his capacity as Secretary of State of the State of Wisconsin, a copy of the injunctional order herein, which was attached to the copy of the subpœna above mentioned by order of the court.

R. J. FLINT,
U. S. Marshal.
By CARL P. McASSEY,
Chief Office Deputy.

Endorsed: Original. Civil Docket A-No. 117. Western Union Telegraph Company, complainant, vs. James A. Frear in his capacity as Secretary of State of the State of Wisconsin, defendant. Subpœna. Filed Mar. 15, 1912. F. W. Oakley, Clerk.

32 Afterwards, to-wit, March 15, 1912, filed interlocutory restraining order, as follows:

In the District Court of the United States for the Western District of Wisconsin.

WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
JAMES A. FREAR, in His Capacity as Secretary of State of the State of Wisconsin, Defendant.

The complainant having filed its bill to enjoin and restrain the defendant as Secretary of State of the State of Wisconsin from revoking the license of the complainant to do business in said State for an alleged violation of one of the statutes of the State of Wisconsin and the complainant having made its motion for an interlocutory injunction or a restraining order restraining the defendant as such Secretary of State from revoking the license of said complainant to do business within the State of Wisconsin or from taking any step in relation to such revocation.

And the Attorney General of the State of Wisconsin having been notified of the filing of said bill and of such application for an injunction and being now here present,

It is on motion of the Solicitors for the complainant, Ordered, that the said motion for a temporary or interlocutory injunction be heard before the District Court of the United States in the Court
33 room of said Court in the City of Madison in said Western District of Wisconsin, on the 15th day of April, A. D. 1912, at the opening of the court on that day or as soon thereafter as counsel can be heard.

It appearing from the bill that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, It is on motion of A. G. Zimmerman and Rufus B. Smith, Solicitors for the Complainant, Ordered, That until the hearing of said motion above referred to and such application for an interlocutory injunction, the defendant, James A. Frear as Secretary of State of the State of Wisconsin and his deputies and assistants be, and they hereby are restrained from revoking the license of the complainant, the Western Union Telegraph Company to do business in the State of Wisconsin or from taking any further steps in the matter of such revocation, or from making any record or entries of record in respect thereto.

Let a copy of this restraining order be attached to the subpœna herein and served therewith.

Dated March 14, A. D. 1912.

A. L. SANBORN, *Judge.*

Enter:
A. L. S.

COPY BOUND TO C

Endorsed: 117 A—Civil Docket. Western District of Wisconsin, U. S. District Court. Western Union Telegraph Company, Complainant, vs. James A. Frear as Secretary of State, Defendant. Interlocutory restraining order. Filed Mar. 15, 1912. F. W. Oakley, Clerk. A. G. Zimmerman, Rufus B. Smith, Solicitors for Complainant, Madison, Wis.

34 Afterwards, to-wit, March 30, 1912, filed notice of appearance of defendant, as follows:

In the District Court of the United States for the Western District of Wisconsin.

WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
JAMES A. FREAR, in his Capacity as Secretary of State of the State of Wisconsin, Defendant.

To the Clerk of the District Court of the United States for the Western District of Wisconsin:

Please enter the appearance of James A. Frear, the defendant in the above cause, and that of ourselves as solicitors, as of the date of the filing hereof.

L. H. BANCROFT,
Attorney General of the State of Wisconsin,
RUSSELL JACKSON,
Deputy Attorney General of the State of Wisconsin,
Solicitors for Defendant.

Endorsed: 117 A—Civil Docket. United States District Court, Western District of Wisconsin. Western Union Telegraph Co., Plaintiff, vs. James A. Frear, in his capacity as Secretary of State of the State of Wisconsin, Defendant. Appearance. Filed Mar. 30, 1912. F. W. Oakley, Clerk.

35 Afterwards, to-wit, May 6, 1912, filed general demurrer to complaint, as follows:

In the District Court of the United States for the Western District of Wisconsin.

WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
JAMES A. FREAR, in His Capacity as Secretary of State of the State of Wisconsin, Defendant.

The Demurrer of James A. Frear, in His Capacity as Secretary of State of the State of Wisconsin, to the Bill of Complaint.

And now comes the defendant, James A. Frear, in his capacity as Secretary of State of the State of Wisconsin, and not confessing

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any of the matters in the bill to be true, demurs to the bill herein filed and says the same does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against this defendant.

Wherefore the defendant prays the judgment of this court whether he shall further answer, and that he be dismissed with his costs.

L. H. BANCROFT,
Attorney General of Wisconsin,
RUSSELL JACKSON,
Deputy Attorney General,
Solicitors for Defendant.

36 I, Russell Jackson, Deputy Attorney General of the State of Wisconsin, and one of the solicitors for the defendant in the above action, do hereby certify that the foregoing demurrer, in my opinion, is well founded in law.

RUSSELL JACKSON, *Solicitor.*

STATE OF WISCONSIN,
County of Dane, ss:

I, James A. Frear, defendant in the above entitled cause, being duly sworn, to say that the foregoing demurrer is not interposed for delay.

JAMES A. FREAR.

Sworn to and subscribed before me this 7th day of May, 1912.

[L. S.] L. B. NAGLER,
Notary Public, Dane County, Wisconsin.

Endorsed: 117 A. Civil Docket. In the District Court for the Western District of Wisconsin. Western Union Telegraph Company, Complainant, vs. James A. Frear in his capacity as Secretary of State of the State of Wisconsin, Defendant. General Demurrer to Complaint. Filed May 6, 1912. F. W. Oakley, Clerk.

37 Afterwards, in the record of the proceedings in said cause, appear the following entries, to-wit:

May 20, 1912.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff,
vs.
JAMES A. FREAR, as Secretary of State of the State of Wisconsin, Defendant.

Ordered by the Court that the hearing on demurrer be set down for argument on Oct. 2, 1912.

Feb'y 25, 1913.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff,
vs.
JAMES A. FREAR, as Secretary of State of the State of Wisconsin, Defendant.

Ordered by the Court that the hearing on demurrer be set down for argument on Sept. 23, 1913.

38 Afterwards, to-wit, August 10, 1914, filed decision as follows:

District Court of the United States, Western District of Wisconsin.

WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
JAMES A. FREAR, as Secretary of State of the State of Wisconsin, Defendant.

THE PHILADELPHIA AND READING COAL AND IRON COMPANY, Complainant,
vs.
JOHN S. DONALD, as Secretary of State of the State of Wisconsin, and Walter C. Owen, as Attorney General of Wisconsin, Defendants.

A. G. Zimmerman and Rufus B. Smith, of Madison, Wisconsin, solicitors for Western Union Telegraph Company.
Percy B. Eckhart, of Chicago, Illinois, counsel for Western Union Telegraph Company.
M. H. Boutelle, of Minneapolis, Minnesota, solicitor for Philadelphia and Reading Coal and Iron Company.
Luse, Powell & Luse, of Superior, Wisconsin, counsel for Philadelphia and Reading Company.
Walter C. Owen, Attorney General, and J. E. Messerschmidt, Assistant Attorney General, solicitors and counsel for defendants.

39 Application for similar injunctions in both of these cases were heard together, under section 266 of the Judicial Code, before Christian C. Kohlsaat, United States Circuit Judge, and Ferdinand A. Geiger, and Arthur L. Sanborn, District Judges, November 24, 1913; preliminary injunctional orders having been previously entered in both cases, restraining the secretary of state from revoking the respective licenses to do business in Wisconsin theretofore issued to complainants respectively.

These corporations have always been rightfully in the state, because they are engaged in interstate and foreign commerce; the telegraph company being also a government agent under certain acts of Congress. They were lawfully in the state, engaged in such business, long before 1898, when the first statute was passed requiring foreign corporations to take out local licenses under penalty of being unable

to make contracts relating to local business, or to acquire or dispose of title to property in such business. As to other than local business they are lawfully in the state, since the statute referred to does not relate to interstate or foreign commerce transactions. Elwell v. Adder Machine Co., 136 Wis., 82, 116 N. W., 882.

In 1905 the Wisconsin legislature passed an act providing as follows:

"Section 1770*f*. Whenever any foreign corporation doing business in this state shall remove or make application to remove into any District Court of the United States any action or proceeding commenced against it by any citizen of this state, upon any claim or cause of action arising within this state, it shall be the duty of the secretary of state, upon such fact being made to appear to him, to revoke the license of such corporation to do business within this state."

40 Each of these corporations has removed to the federal court a case against it of the kind referred to in the statute. The secretary of state having threatened to revoke their licenses, these applications for temporary injunctions were made, and heard as already stated.

So far as purely local business is concerned the state has the right to impose conditions, not in conflict with the Constitution or the laws of the United States, to the transaction of business within its territory by an insurance company chartered by another state, or to exclude such company from its territory, or, having given a license, to revoke it, with or without cause. Doyle v. Continental Insurance Co., 94 U. S., 535, 24 L. Ed., 148.

It is argued by counsel for the state that the mere revocation of the license of a foreign corporation doing both a local and interstate business will in no way affect its right to continue the transaction of business in interstate and foreign commerce. If, however, it makes a contract or acquires property wholly in its local business, then it comes within the disabilities and penalties prescribed in section 1770*b*.

The Supreme Court of the United States has laid down certain rules in deciding cases similar to these, and so far as that court has settled the law it is, of course, the duty of this court to apply it. The following propositions are established:

1. Any attempt to substantially discriminate between domestic corporations and foreign corporations admitted to do business in a state, prejudicial to the latter, is invalid, whether it be by unequal taxation or other substantial inequality. Under such circumstances the cancellation of the foreign corporation license by a state

41 officer will be restrained. Herndon v. Chicago, R. I. & P. R. Co., 218 U. S., 135, — Sup. Ct. 54 L. Ed., 970, and Roach v. Atchison, T. & S. F. R. Co., 218 U. S., 159, — Sup. Ct. —, 54 L. Ed., 978.

2. If the state statute requires the foreign corporation, as a condition of being permitted to enter or remain in the state, expressly or impliedly to stipulate or agree that it will not exercise its constitutional right to remove suits to the federal courts, or prosecute suits

therein, such statute is invalid because requiring the corporation to give up a constitutional right; and the revocation of its license to do local business may be restrained. Home Ins. Co. v. Morse, 20 Wall., 445, 22 L. Ed., 365, Barron v. Burnside, 121 U. S., 186, 7 Sup. Ct., 931, 1 Inters. Com. Rep., 295, 30 L. Ed., 915, and other cases approving the Barron case, cited by Mr. Justice Day in Security Mutual Ins. Co. v. Prewitt, 202 U. S., 246, 263, 26 Sup. Ct., 619, 50 L. Ed., 1013, 1020.

The rulings referred to seem decisive of this application, so that it is unnecessary to consider other points.

The only discrimination we are able to perceive in the Wisconsin law, in favor of domestic and against foreign corporations, is a very narrow one. Foreign corporations are not allowed to remove cases against them by citizens of Wisconsin, on causes of action there arising. The same rule applies to domestic corporations under section 28 of the Federal Judicial Code, which does not allow defendants to have removal for diverse citizenship unless they are non-residents of the state. Hence domestic corporations cannot exercise such a right. If, however, the suit against the do-
42 mestic corporation presents a federal question, and more than $3,000 is in dispute, it may remove the case though a citizen and resident of the state, and though the plaintiff is a citizen of the same state and the cause of action arose therein. To this limited degree there is discrimination; but instances of such cases would be very rare. The question of the right to remain in the state may also be litigated by the foreign corporation in the state courts, with a final right of review in the Supreme Court by writ of error to the highest state court. It is unnecessary on these motions for injunctions to pass on this narrow question because a consideration of the second point referred to seems to require the court to direct the temporary injunctions prayed.

On first reading the Wisconsin statutes seem to discriminate against foreign corporations by exacting an occupation tax from which domestic bodies are exempt; but a careful consideration of the acts shows that this is not true. Paragraph *c* of subdivision 7 of section 1770*b* requires foreign companies to report annually the amount of business done in Wisconsin, and to pay a dollar a thousand on any increase not previously reported. Domestic companies are not required to include in their annual reports any such facts, or make any such payment. But a complete and thorough comparison of the statutes demonstrates that this tax on business is really on the capital stock, and is not required to be paid unless the charter is amended so as to increase the capital locally employed beyond the amount already paid for. So the tax is only a license fee, payable on substantially the same terms as domestic fees. It is a well known fact in Wisconsin that this is the construction adopted by the state officers, under which they have uniformly acted. The con-
43 sistent policy in Wisconsin has been to encourage foreign corporations to do business in the state by making their status the same as that of domestic companies, but to prevent them from carrying on business there unless licensed, so as to collect from them

taxes or license fees commensurate with those exacted from local bodies, and making them readily suable there. This policy of equality appears from the statute, and is emphasized by subdivision 10 of section 1770*b*, adopting from Illinois a provision that foreign corporations shall have no other or greater powers than like domestic bodies, and from the uniform construction of these statutes by the state officers. Provisions designed to prevent the removal of causes to federal courts, like that of section 1770*f* and the insurance statute under review in State ex rel. Drake v. Doyle, 94 U. S., 535, 24 L. Ed., 148, were found necessary by the unreasonable and oppressive conduct of the foreign corporations themselves in removing cases merely for greater delay, vexation and expense. It used to be common practice in Wisconsin for foreign corporations under injunction from state courts to remove the case on a Saturday afternoon, thus ipso facto vacating the state injunction, and then hustle a gang of men upon the enjoined work and get it done by Monday, before any other restraining order could issue.

The second point, resting on the Morse and Burnside cases, raises the question whether the statute requires foreign companies, as a condition of coming in or staying in, to agree that they will not remove cases to the federal courts. If so the legislation is invalid under those decisions. The statute provides that the foreign corporation, as a condition of doing business in the state, or con-
44 tinuing it, shall state in its application to come in, and its annual sworn reports, that it will comply with all the laws of the state relative to foreign corporations. One of these laws provides that if the corporation shall avail itself of the right of removal it shall lose its local license. The question is whether the company, thus compelled to state that it will comply with the local law, is in substance compelled to contract, as a condition of its admission or continued presence in the state, that it will not exercise its constitutional right of removal, but consent to litigate certain cases only in the state court. Counsel for the state officers urge that the corporation is required to stipulate only that it will comply with certain positive requirements, such as making annual reports, paying license fees when it amends its articles, and keeping out of trusts, pools or combinations in restraint of trade. It is given the option, it is said, to remove or refrain from removing. Whether it does one or the other it is still complying with the Wisconsin law.

The question is whether section 1770*f* is substantially a command or prohibition to refrain from taking a removal. It is evident that such a stipulation in the ordinary private contract would not be a prohibition, but merely a condition. But contracts such as those here in question are not between citizens or subjects, but between a political superior and a subject—between the state as a local sovereignty and a citizen or subject of another state. The object of such statutes is public policy. The corporation cannot elect
45 whether it will stay out, being practically coerced to come in by threatened loss of contract and property rights. The parties are by no means on equal terms. One is a sovereign, dictating what the subject, in these cases lawfully in the state for some purposes, shall do if it remains therein for other purposes closely related.

So when the state enacts that if the subject does something it has a perfect abstract right to do it shall be punished, it is thereby substantially prohibited. The federal penal code of 1909, (35 Stat., 1089, Comp. Stats., 1911 Sup., 1590), contains very few express commands. Most of its sections provide that whoever shall do certain acts shall be punished. This is the same as enacting that these are unlawful and prohibited. No one would contend that these were not commands to refrain from those acts. They are prohibitions from a political superior to a subject, enacted for the public welfare. The state says to the telegraph company or coal company, "You are in the state lawfully for interstate and government business. If, however, you do any other kind of business you must have a local license. If you remove to a federal court any case, whether in your interstate or local business, brought against you by a citizen of Wisconsin on a cause of action arising therein, your license to do a local business will be revoked. Any contract not in interstate commerce you may thereafter make will be void in your favor but valid against you, and any conveyance of land for local purposes which you may take will not vest any title." This is a substantial command or prohibition. It is the same as saying, "You shall not remove such a case."

In the Morse case, (20 Wall., 445), there was an express
46 stipulation not to remove actions against the company. But in the Burnside case, (121 U. S., 186), the prohibition was implied, as it is here. The application of the foreign corporation to be permitted to do business in Iowa was required to contain a stipulation "that said permit shal- be subject to each of the provisions" of the foreign corporation statute. A removal to a federal court by the corporation was made a forfeiture of the permit. No application had ever been made by the company to be permitted to do business in the state, and one of its servants was arrested for running an interstate train in Iowa. The court said: "The locomotive engineer is arrested for acting as such in the employment of the corporation because it has refused to stipulate that it will not remove into the federal court suits brought against it in the state court, as a condition of obtaining a permit, and consequently has not obtained such permit. * * * As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States the statute requiring the permit has been held to be void." This decision has been many times approved by the Supreme Court and circuit courts of appeals. The citing cases are discussed by Mr. Justice Day in the dissenting opinion in the Prewitt case supra.

Being unable to distinguish these cases from the Burnside decision, the duty to grant the applications for a preliminary injunction is plain. The case of Harrison v. San Francisco R. Co., 232 U. S., 318, decided since the hearing, seems to strengthen our position.

Aug. 10, 1914.

KOHLSAAT, *Circuit Judge.*
SANBORN, *District Judge.*
47 GEIGER, *District Judge.*

Endorsed: 117 A. Civil Docket. United States District Court, Western District of Wisconsin. Western Union Telegraph Company, Complainant, vs. James A. Frear, in his capacity as Secretary of State of the State of Wisconsin, and others, Defendant. Decision. Filed Aug. 10, 1914. F. W. Oakley, Clerk.

48 Afterwards, to-wit, August 22, 1914, filed interlocutory injunction, as follows:

In the District Court of the United States for the Western District of Wisconsin.

WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
JAMES A. FREAR, in His Capacity as Secretary of State of the State of Wisconsin, Defendant.

The complainant having filed its bill, praying for a final decree enjoining and restraining the Defendant as Secretary of State of the State of Wisconsin, and his successors in person, or by deputy, or assistant from cancelling or revoking the license, or permit of the Complainant to do business in the State of Wisconsin, or from taking any action, or causing any action to be taken against the Complainant for, or on account of an alleged violation of an act of the legislature of Wisconsin purporting to declare the license, or permit of the Complainant to do business within the State of Wisconsin, forfeited, on account of the removal of a cause from the State Court of said State to the Federal Court, and praying that an interlocutory injunction be issued, forbidding such action on the part of the defendant, and his successors during the pendency of this action, and until the final determination thereof.

49 And, five (5) days' notice of such application for such interlocutory injunction having been given to the Attorney General of the State of Wisconsin, and to the defendant, Secretary of State.

And, the Judge of the District Court of the United States for the Western District of Wisconsin, to-wit, Honorable Arthur L. Sanborn, having called to his assistance to hear and determine the said application, two (2) other judges, namely, Honorable Christian C. Kohlsaat, United States Circuit Judge, and Honorable Ferdinand A. Geiger, United States District Judge.

And, the said application having been heard before the said three (3) Judges, and the said three (3) judges having heard solicitors for the Complainant, and the said Attorney General of the State of Wisconsin, for the Defendant, and the matter having been submitted,

And, the said three (3) judges having on the 10th day of August 1914 filed in said District Court of the United States for the Western

District of Wisconsin their decision, granting an interlocutory injunction to the Complainant, as prayed for,

It is therefore on motion of A. G. Zimmerman and Rufus B. Smith, solicitors for said Complainant, and Percy B. Eckhart of counsel, Ordered, that during the pendency of this action, and until final decree herein, the Defendant, as Secretary of State of the State of Wisconsin, and his successor in said office in person, or by deputy or assistant, are enjoined and restrained from cancelling, or revoking the license, or permit of the Complainant to do business in the State of Wisconsin, or from taking any action, or causing any action to be taken against the Complainant, for or on account of its alleged violation of an act of the legislature of Wisconsin, declaring,
50 or purporting to declare the license, or permit of complainant to do business within the State of Wisconsin, forfeited, on account of the removal of a cause from the State Court of said State of Wisconsin to the Federal Court, and from making any entry of record in person, or by deputy, or assistant, which would purport to cancel the said permit of the said complainant to do business within said State of Wisconsin.

Dated August 22nd, 1914.

By the Court:

A. L. SANBORN, *Judge.*

Endorsed: 117 A—C. Dk. Western District of Wisconsin. U. S. District Court. Western Union Telegraph Company, complainant, vs. James A. Frear, Sec't'y of State etc., defendant. Interlocutory injunction. Filed Aug. 22, 1914. F. W. Oakley, Clerk. A. G. Zimmerman & Rufus B. Smith, sol's for complainant' Madison, Wis.

Afterwards, to-wit, September 17, 1914, came the defendant by his solicitors, and filed petition for and order allowing appeal, as follows:

51 United States District Court in and for the Western District of Wisconsin.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,

vs.

JAMES A. FREAR, in His Capacity as Secretary of State of the State of Wisconsin, Defendant.

The above named defendant, James A. Frear in his capacity as Secretary of State of the State of Wisconsin, conceiving himself aggrieved by the interlocutory injunction entered on September 17, 1914, in the above entitled action, doth hereby appeal from said interlocutory injunction to the Supreme Court of the United States, and he prays that this his appeal may be allowed; and that a transcript of the record and proceedings and papers upon which said inter-

to make said appeal good, then this obligation shall be void,
56 otherwise the same shall be and remain in full force and virtue.

JOHN S. DONALD, [SEAL.]
Secretary of State.

——— ———. [SEAL.]

UNITED STATES FIDELITY & GUARANTY CO.,
By C. F. LAMB,
[L. S.] *General Agent and Attorney in Fact.*

Sealed and delivered and taken and acknowledgel this 17th day of September, 1914 before me

——— ———,
——— ———.

Approved by
A. L. SANBORN,
District Judge.

Endorsed: 117-A C. Dk. United States District Court, Western District of Wisconsin. Western Union Telegraph Company, complainant, vs. James A. Frear, in his capacity as Secretary of State of the State of Wisconsin, defendant. Bond. Filed Sep. 21, 1914. F. W. Oakley, clerk.

September 18, 1914, filed præcipe for transcript and admission of service, as follows:

Due and personal service of the within præcipe admitted this 18th day of September, 1914.

A. G. ZIMMERMAN,
RUFUS B. SMITH,
Solicitors for Complainant.

57 United States District Court in and for the Western District of Wisconsin.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,
vs.
JAMES A. FREAR, in His Capacity as Secretary of State of the State of Wisconsin, Defendant.

To the Clerk of the United States District Court in and for the Western District of Wisconsin:

You will please prepare a transcript of the following papers constituting the record filed in the above entitled action in your office in the United States Court for the Western District of Wisconsin, to wit:

Bill in Equity, Subpœna, Motion for Temporary Injunction,

Temporary Restraining Order, Notice of Appearance of the Attorney General, General Demurrer by Defendant to Bill in Equity, Opinion by the Court, Interlocutory Injunction, Petition for Appeal, Order Allowing Appeal, Citation, Assignment of Error-, Appeal Bond and Approval, and Præcipe, and transmit the same to the Clerk of the Supreme Court of the United States, together with the appeal papers, for the use of said court in the trial of the appeal herein.

WALTER C. OWEN,
Attorney General;
J. E. MESSERSCHMIDT,
Assistant Attorney General,
Attorneys for Defendant.

58 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

I, F. W. Oakley, Clerk of the District Court of the United States for said district, do hereby certify that I have compared the foregoing transcript of record with the original records of this Court now remaining of record in my office in the case herein lately pending of the Western Union Telegraph Company, complainant, vs. James A. Frear, in his capacity as Secretary of State of the State of Wisconsin, defendant, and that the same is a correct transcript thereof.

I further certify that the citation, with admission of service thereon, hereto annexed, is the original citation and admmision of service granted in said cause.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said Court, at the City of Madison, in the said Western District of Wisconsin, this 21st day of September, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the said United States the one hundred and thirty-ninth.

[Seal U. S. District Court Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY, *Clerk,*
By FRED W. FRENCH, *Deputy.*

September 17, 1914, citation issued in said cause, as follows, to-wit:

59 Original.

United States District Court in and for the Western District of Wisconsin.

THE WESTERN UNION TELEGRAPH COMPANY, Complainant,

vs.

JAMES A. FREAR, in His Capacity as Secretary of State of the State of Wisconsin, Defendant.

UNITED STATES OF AMERICA, *ss:*

To Rufus B. Smith, Madison, Wisconsin; A. G. Zimmerman, Madison, Wisconsin, and Percy B. Eckhart, Chicago, Illinois, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the 17th day of October, nineteen hundred and fourteen, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Western District of Wisconsin, wherein James A. Frear in his capacity as Secretary of State of the State of Wisconsin, is appellant and The Western Union Telegraph Company is respondent, to show cause, if any there be, why the interlocutory injunction in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties *on* that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 17th day of September, in the year of our Lord one thousand nine hundred and fourteen.

A. L. SANBORN,
District Judge.

60 [Endorsed:] 117-A. Civil Docket. Original. State of Wisconsin. United States District Court, Western District of Wisconsin. The Western Union Telegraph Company, complainant, vs. James A. Frear in his capacity as secretary of state of the State of Wisconsin, defendants. Citation. Due and personal service of the within citation admitted this 18 day of September, 1914. A. G. Zimmerman & Rufus B. Smith, solicitors for complainant. Filed Sep. 18, 1914. F. W. Oakley, clerk.

Endorsed on cover: File No. 24,381. W. Wisconsin D. C. U. S. Term No. 254. James A. Frear, in his capacity as secretary of state of the State of Wisconsin, appellant, vs. The Western Union Telegraph Company. Filed September 26th, 1914. File No. 24,381.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 366.

JAMES A. FREAR, in his Capacity as Secretary of State of the State of Wisconsin,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,

Respondent.

Appeal from the District Court of the United States for the Western District of Wisconsin.

BRIEF FOR APPELLANT.

WALTER C. OWEN,
Attorney General.

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SUBJECT INDEX.

	Page
Nature of Suit	1
Result	2
Statement of Facts	3
Assignments of Error	9
Argument	10
I. Policy of the State of Wisconsin Concerning Corporations.	11
II. The Provision of the Wisconsin Statutes, that, if a Foreign Corporation shall Remove or Make Application to Remove into any District or Circuit Court of the United States any Action or Proceeding Commenced against it by any Citizen of Wisconsin upon any Claim or Cause of Action Arising within this State, the License Issued to said Corporation shall be Void and the Secretary of State shall enter such Forfeit in the Records in his Department, has not for its Object to Oust the Federal court of Jurisdiction, but the Primary Purpose is the Putting of Foreign Corporations on Substantially the same Footing as Domestic Corporations and such is the Result	14

Page

III. The Mandate of the Fourteenth Amendment to the Constitution of the United States, that no State shall Make or Enforce any Law which shall deny to any Person within its Jurisdiction the Equal Protection of the Laws, is Applicable to Remedial Rights 23

IV. The Rule of Comity goes only so far as to Place Foreign Corporations on an Equal Basis with Domestic Corporations, but never Beyond 31

V. The Rule of the Doyle and Prewitt Cases, Properly Qualified and Limited in its Scope, is Applicable to this Statute and is Sufficient to Sustain its Constitutionality 34

VI. A Foreign Corporation is not Required by the Statutes of Wisconsin, as a Condition for Receiving a License in the State of Wisconsin, to Stipulate that it will not remove a Case to the Federal Court 53

VII. A Stipulation Required to be Filed in the Secretary of State's Office by a Foreign Corporation that it will not Remove a Case to the Federal Court does not in any way Change the Effect of a Statute of this Nature 63

Page

VIII. The Wisconsin Statutes Relating to Foreign ~~Insurance~~ Companies do not in any way Interfere with or Affect Interstate Commerce 64

IX. The Revocation of the License of the Respondent Does not Deprive it of any Constitutional Rights 67

Summary 74

Conclusion 77

Appendix, Laws of Wisconsin Relating to Foreign Corporations 79 87

CASES CITED.

	Page
Allen v. Milwaukee, 128 Wis. 678	65
Ashland L. Co. v. Det. S. Co., 114 Wis. 66	65
Bank of Augusta v. Earle, 13 Pet. 519	32
Barbier v. Connolly, 113 U. S. 27	24
Barron v. Burnside, 121 U. S. 186	39, 40, 53, 61
Beaser v. Barber A. P. Co., 120 Wis. 599	65
Bigelow v. West. R. Co., 27 Wis. 478	56
Blair v. Milw. etc. Ry. Co., 20 Wis. 254	67
Catlin & Powell Co. v. Schuppert, 130 Wis. 642	65
Chicago R. R. Co. v. Cutts, 94 U. S. 155	73
Chicago T. & T. Co. v. Bashford, 120 Wis. 281	65, 68–71
Chickering-Chase Bros. Co. v. White, 127 Wis. 83	65
Clark v. Central Ry. Co., 50 Fed. 338	31
Coe v. Rothman, 126 Wis. 515	71
Cohens v. Virginia, 6 Wheat. 399	51
Coler v. Tac. R. etc. Co., 65 N. J. Eq. 347	33
Cook, State v., 171 Mo. 348	33
Daniels v. Tearney, 102 U. S. 421	62
Doyle v. Continental Ins. Co., 94 U. S. 535,	22, 37, 39, 40, 46, 47, 48, 50, 55, 57, 60
Doyle, State ex rel. Drake v., 40 Wis. 175	18, 36, 37, 61
Drake v. Doyle, 40 Wis. 175	18, 36, 37, 61
Ducat v. Chicago, 10 Wall. 410	65
Durkee v. City of Janesville, 28 Wis. 464	26–29
Elwell v. Adder Machine Co., 136 Wis. 82	65, 71
Empire Mills Co. v. Alston G. Co., 15 S. W. 200	32
Falls v. U. S. Savings, Loan, etc. Co., 97 Ala. 417	33
Faulker v. Hyman, 142 Mass. 53	33
Fisher v. Lord, 63 N. H. 514	33
Fowler v. Bell, 90 Tex. 150	33
Furguson v. Landrum, 5 Bush. 230, 196 Am. Dec. 350	62

	Page
Granada Co. v. Brogden, 112 U. S. 261	56
Greek-Am. S. Co. v. Richardson D. Co., 124 Wis. 469	65
Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150	25
Harding v. Am. Glu. Co., 182 Ill. 551	33
Harrison v. St. L. & S. F. R. Co., 232 U. S. 318	46
Herndon v. Chi., R. I. & Pac. Ry. Co., 118 U. S. 135	44
Hiskey v. Pac. States Savings, etc. Co., 27 Utah, 409	33
Home Ins. Co. v. Morse, 20 Wall. 447	34, 40, 57, 61
Horn Silver Mining Co. v. New York, 143 U. S. 305	33, 65
Inde. Tug Line v. Superior L. & B. Co., 146 Wis. 121	19
Janesville v. Carpenter, 77 Wis. 288	30
Johns v. Milwaukee, 88 Wis. 389	56
Johnson v. Goodyear, 59 Pac. 304	25
Kellogg v. Currens, 111 Wis. 431	30
Louis. & N. R. Co. v. Kentucky, 183 U. S. 503	72
Ludwig v. W. U. Tel. Co., 216 U. S. 146	43
Madison, etc. Plank Road Co. v. Reynolds, 3 Wis. 287	67
Milwaukee Gaslight Co., State v., 29 Wis. 454	67
Missouri v. Kansas City, etc. Ry. Co., 32 Fed. 722	56
Missouri v. Lewis, 101 U. S. 22	26
Morse, Home Ins. Co. v., 20 Wall. 447	34, 40, 57, 61
National Cotton Oil Co. v. Texas, 197 U. S. 115	65
National Council v. State Council, 203 U. S. 163	41
Newport & C. Bridge Co. v. United States, 105 U. S. 470	74
New York & N. E. R. Co. v. Bristol, 151 U. S. 556	67
Osborne v. Florida, 164 U. S. 650	73

	Page
Palms v. Shawano Co., 61 Wis. 211	56
Paul v. Virginia, 8 Wall. 168	65
People v. Howard, 50 Mich. 239	33
Pratt v. Brown, 3 Wis. 603	67
Presbyterian M. Fund v. Thomas, 126 Wis. 281	32, 65
Prewitt, Security Mut. Life Ins. Co. v., 202 U. S. 246, 50 L. Ed. 1013	22, 39, 46, 47, 48, 50, 63
Pullman Co. v. Kansas, 216 U. S. 56	43
Randolph v. Builders, etc. Supply Co., 106 Ala. 501, 17 So. 721	25
Security Mut. Life Ins. Co. v. Prewitt, 202 U. S. 246, 50 L. Ed. 1013	22, 39, 46, 47, 48, 50, 63
Singer Mfg. Co. v. McCollock, 24 Fed. 667	56
Smiley v. Kansas, 196 U. S. 447	65
Southern Ry. Co. v. Green, 216 U. S. 400	30, 43
State v. Cook, 171 Mo. 348	33
State v. Milw. Gaslight Co., 29 Wis. 454	67
State ex rel. Drake v. Doyle, 40 Wis. 175	18, 36, 37, 61
State ex rel. Kellogg v. Currens, 111 Wis. 431	30
Stricker, Ex parte, 109 Fed. 150	24
Swing v. Weston Lbr. Co., 205 U. S. 278	41
Tampa Waterworks Co. v. Tampa, 199 U. S. 241	65
Toomey v. Sup. Lodge K. P. W., 74 Mo. App. 507	33
United States v. Cent. Pac. Ry. Co., 118 U. S. 235	56
United States v. Coombs, 12 Pet. 75	56
United States v. Del. Ry. Co., 213 U. S. 366	73
United States Mort. Co. v. Gross, 93 Ill. 483	33
Van Steuben v. Cent. Ry. Co., 178 Pa. St. 367	32
Walters v. Whitlock, 9 Fla. 86	33
Western Union Tel. Co. v. Julian, 169 Fed. 166	45
Western Union Tel. Co. v. Kansas, ~~216~~ 216 U. S. 1	42
White v. Howard, 46 N. Y. 144	33

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915.

No. 254.

JAMES A. FREAR, in his Capacity as Secretary of State of the State of Wisconsin,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,

Respondent.

Appeal from the District Court of the United States for the Western District of Wisconsin.

BRIEF FOR APPELLANT.

NATURE OF SUIT.

This is an appeal from a temporary injunction enjoining the Secretary of State, of the State of Wisconsin from revoking the license of the Western Union Telegraph Company,

the complainant, to transact intrastate business in Wisconsin as a foreign corporation.

The application was made in the district court of the United States for the western district of Wisconsin. Judge Sanborn, the district judge, granted a preliminary restraining order under the provisions of section 262 of the Judicial Code. The case was heard on November 24, 1913, at Chicago, before Hon. Christian C. Kohlsaat, United States circuit judge, Hon. Ferdinand A. Geiger and Hon. Arthur L. Sanborn, district judges, under section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stats., 1162 [U. S. Comp. St. Supp. 1911, p. 236]).

RESULT.

After having the matter under consideration for nearly ten months decision was rendered August 10, 1914, in favor of the complainant and the temporary injunctional order was thereupon issued.

The issues in this case were raised by a demurrer to the bill.

A BRIEF STATEMENT OF THE FACTS ALLEGED IN THE COMPLAINT.

The Western Union Telegraph Company is a corporation organized under the laws of New York and has its office and principal place of business in the city of New York.

The Congress of the United States passed an act approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes."

Another act of Congress, approved July 10, 1872, entitled "An act making appropriation for sundry civil expenses of the government for the fiscal year ending June 30, 1875," provided that all telegraph companies accepting the provisions of the act approved July 24, 1866, were required to transmit to the Secretary of War of the United States the results of observations at signal places and reports for the weather bureau department of the government under penalties fixed and defined by the last named act; that the complainant complied with the provisions of said act of Congress approved July 24, 1866, and did, on the eighth day of June, 1866, file with the Postmaster General of the United States its written acceptance of all the restrictions and obligations of the said act, and that thereupon the complainant became entitled to all the rights

and privileges of said act and that it has at all times since the filing of said acceptance fully performed all obligations and requirements of said act, and has, as part of the postal equipment of the United States, and as an instrumentality of the postal department of the United States, carried, upon its lines of telegraph, messages for the government of the United States for the several departments thereof and for the people of the United States and of the State of Wisconsin as prescribed and required in and by the provisions of said act.

The Western Union Telegraph Company organized in the year 1851, and then began the construction and operation of telegraph lines. Since that time it has been continuously engaged in the transmission of messages and information by telegraph, and at the present time its telegraph lines cover over 219,000 miles of poles and cables and over 1,400,000 miles of wire. Upon its system it has over 24,900 offices, and transmits yearly about 70,000,000 messages for the public and for the government of the United States, and, by arrangement with other countries, into Canada, Mexico and the South American republics, and by cable with foreign countries. These lines are all connected with its main office in New York; and most of them constructed in the State of Wisconsin were placed there since the acceptance by the complainant of the terms and conditions of the act of Congress approved July 24, 1866.

Its telegraph lines within the State of Wisconsin are largely upon the public domain and upon the military and postal routes of the United States, and said lines of telegraph in Wisconsin are part of the postal routes and part of the postal establishment of the United States, and the complainant is under a duty and obligation to transmit all messages for the government and for the public generally, including both messages between points within the state and interstate messages.

A large per cent of the people of the State of Wisconsin are dependent upon the facilities maintained and offered by the complainant, both as to intrastate and interstate service, and many of the railroads are dependent upon the service of the complainant for the successful operation of their trains.

The bill further alleges that on the 6th day of December, A. D. 1911, one Walter L. Houser, in his capacity as trustee of the estate of David Blum, bankrupt, a resident of the State of Wisconsin, commenced an action in the circuit court of Dane county, Wisconsin, against this complainant, claiming as damages the sum of fifteen thousand nine hundred ($15,900) dollars for or on account of an alleged failure on the part of this complainant to transmit and deliver a telegram filed at Philadelphia in the State of Pennsylvania, to be transmitted to said David Blum at Mondovi, in the State of Wisconsin; that the complainant was advised by counsel that, for the proper presentation of its defense to said ac-

tion, it should exercise the right of removal of said cause to the district court of the United States for the western district of Wisconsin as authorized by the constitution and laws of the United States, and that, for the reason assigned, the said complainant did remove the said action from the state court to the district court of the United States and will remove other causes if such removal is authorized by the constitution and laws of the United States; that in the year 1898 the legislature of the State of Wisconsin duly passed an act now known as section 1770*b* of the statutes of Wisconsin, which act provided, among other things, that no foreign corporation incorporated otherwise than under the laws of the State of Wisconsin should transact any business or own property in the State of Wisconsin until such corporation should have filed in the office of the secretary of state of the State of Wisconsin a duly authenticated copy of its charter and consent to the appointment of the secretary of the state as its attorney to accept service of any process or proceedings against it.

On the 20th day of June, 1905, the legislature of Wisconsin enacted a law now known as section 1770*f* of the statutes of Wisconsin, which enactment is in the words and figures following:

> "Whenever any foreign corporation doing business in this state shall remove, or make application to remove, into any district court of the United States any action or proceeding commenced against it by any

citizen of this state, upon any claim or cause of action arising within this state, it shall be the duty of the secretary of state, upon such fact being made to appear before him, to revoke the license of such corporation to do business within this state."

It is further alleged that in the year 1907, at the request of the secretary of state, and for no other reason, the complainant filed in the office of the secretary of the state of the State of Wisconsin a duly authenticated copy of its charter as required by section 1770*b* of the statutes of Wisconsin, and paid to the state the fee of twenty-five ($25.00) dollars as provided by said act, and that such filing and the payment of such fee to the secretary of state as aforesaid was made *ex gratia*, and not because the complainant believed such filing and such payment was obligatory; and it is further averred that on the 31st day of December, 1907, the secretary of state of the State of Wisconsin issued to the complainant a license to transact business within this state and that said license is unrevoked and is now in the possession of the complainant;

That after the year 1851, and before the year 1860, complainant extended its license for telegraph into the State of Wisconsin, with the consent and acquiescence of the state, and has since been engaged in the business of transmitting messages by telegraph, both intrastate and interstate; and, for the purpose and transaction of the said business, has invested very large sums of money in and about

the construction of lines of telegraph in said state and in the establishment of telegraph offices and other equipment incidental thereto; and that prior to the enactment of the statute hereinbefore referred to, there was no statute of the State of Wisconsin providing for the revocation of the right of the complainant to do business in the state as a penalty for removing any suit to the federal court and for exercising any other right secured to it by the constitution and laws of the United States;

That relying upon the consent of the state, complainant has entered into a large number of contracts and made leases with reference to buildings and has established a large number of offices exceeding in number seven hundred and twenty-five (725) within the state and has acquired rights-of-way, easements and franchises, all of which was done long prior to the said resolution of 1905, and all with the consent of the State of Wisconsin, and that since the establishment of said lines the complainant has used them for the transaction of telegraph messages for the government of the United States and for the public as an instrumentality of the postal department, both wholly within the State of Wisconsin and also for interstate commerce;

That the complainant has invested in the State of Wisconsin large sums of money in excess of seven hundred thousand ($700,000) dollars;

That the legislation of Wisconsin hereinbefore set forth is unconstitutional and void

under the provisions of the constitutions of Wisconsin and of the United States and is violative of the Fourteenth Amendment to the constitution of the United States.

That the defendant, in his capacity of secretary of state of the State of Wisconsin, has threatened and given out that he will revoke the license of the complainant to do business in the State of Wisconsin for the reason that complainant has exercised his rights under the constitution and laws of the United States in removing to a court of the United States the action commenced in the state court by said Walter L. Houser.

The complaint also alleged conclusions of law which it is not necessary to give in this brief.

ASSIGNMENTS OF ERROR.

1. The United States District Court for the Western District of Wisconsin erred in refusing to grant the prayer of the defendant that the temporary restraining order against the defendant be dissolved and that the bill of complaint and this suit be dismissed.

2. The said court erred in granting the interlocutory injunction against the defendants herein.

3. The said court erred in its construction of the statutes of Wisconsin relating to foreign corporations.

4. The said court erred in holding that the Wisconsin statutes require a foreign corporation to stipulate or agree that it will not remove into any district court of the United States any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within said state.

5. The said court erred in holding as invalid and unconstitutional and as contravening the constitution of the United States the following provision of section 1770*f* of the Wisconsin statutes:

> "Whenever any foreign corporation doing business in this state shall remove, or make application to remove, into any district court of the United States any action or proceeding commenced against it by any citizen of this state, upon any claim or cause of action arising within this state, it shall be the duty of the secretary of state, upon such fact being made to appear to him, to revoke the license of such corporation to do business within this state."

ARGUMENT.

The question before this court is whether section 1770*f* of the Wisconsin statutes is constitutional.

In presenting this question to this honorable court, we are not unmindful of the fact that statutes of other states which appear to con-

tain somewhat similar provisions have been declared to be violative of provisions of the constitution of the United States. But, believing that the corporation laws of the State of Wisconsin and the scope and purpose of the above provision present somewhat different issues to this court than those considered in said cases, and in view of the necessity of a law of this nature, we respectfully call the court's attention to the following argument which we believe gives sufficient grounds to sustain the constitutionality of this law.

We deem it our duty, as public officers of the State of Wisconsin, to again urge upon the honorable court the consideration of this question and the reasons for the need of this law, and that the same is consistent with that mutual comity and respect which should prevail between the state and general government.

I.

Policy of the State of Wisconsin Concerning Corporations.

The State of Wisconsin has always endeavored to place foreign and domestic corporations doing intrastate business within its borders on substantially an equal footing. The corporation laws of this state do not contain any discriminations against any foreign corporation nor any provisions favoring corpora-

tions that have been created under the laws of the State of Wisconsin. This policy is not only exemplified in all the provisions of the Wisconsin corporation laws, but finds expression in the specific provisions of subsec. 10, sec. 1770*b*, which are as follows:

> "All foreign corporations and the officers and agents thereof doing business in this state shall be subjected to all the liabilities and restrictions that are or may be imposed upon corporations of like character organized under the laws of this state, and shall have no other or greater powers."

Thus, when a license fee is imposed upon a domestic corporation, a like fee is also placed upon a foreign corporation of the same nature. When a report of its business and property is required of one, it must also be made by the other. Forfeitures are imposed equally for like offenses and no advantage is given to either. It is not necessary to enumerate the various provisions in which this policy finds expression, for the corporation laws of Wisconsin are very extensive and it is not made necessary for the reason that we understand that counsel for respondent do not and cannot point out any substantial discrimination under the laws of this state against foreign corporations; and the trial court herein has found that there is no discrimination unless it be found in the said provision of section 1770*b*, above quoted, which will be considered hereinafter.

It must be remembered, in connection with this question, that Judge Ferdinand A. Geiger and Judge Arthur L. Sanborn, who, with Judge Christian C. Kohlsaat, heard the instant case in the lower court, are federal district judges of the State of Wisconsin, having formerly practiced law within the jurisdiction of said state and being conversant with the laws concerning corporations, and, after examination of the same, have come to the following conclusion in their opinion expressed, to wit:

> "The consistent policy in Wisconsin has been to encourage foreign corporations to do business in the state by making their status the same as that of domestic companies, but to prevent them from carrying on business there unless licensed, so as to collect from them taxes or license fees commensurate with those exacted from the local bodies, and making them readily suable there. This policy of equality appears from the statute, and is emphasized by subdivision 10 of section 1770*b*, adopting from Illinois a provision that foreign corporations shall have no other or greater powers than like domestic bodies, and from the uniform construction of these statutes by the state officers." (Trans. p. 21.)

In view of said policy, which cannot be successfully controverted, we will now consider the purpose and reasons for the enactment of the statute in question.

II.

The Provision of the Wisconsin Statutes, that, if a Foreign Corporation shall Remove or Make Application to Remove into any District or Circuit Court of the United States any Action or Proceeding Commenced Against it by any Citizen of Wisconsin upon any Claim or Cause of Action Arising within this State, the License Issued to Said Corporation shall be void and the Secretary of State shall enter such Forfeit in the Records in his Department, has not for its Object to Oust the Federal Court of Jurisdiction, but the Primary Purpose is the Putting of Foreign Corporations on Substantially the same Footing as Domestic Corporations, and such is the Result.

It will be observed that this provision of the statute does not prohibit a foreign corporation from resorting to the federal court when it begins a suit of its own accord against any citizen of the State of Wisconsin. It may begin any suit or proceeding in a federal court against any citizen of the state and its license cannot be revoked on that ground. If a citizen of the State of Wisconsin brings an action against a foreign corporation in a federal court, the foreign corporation is permitted to defend such action and no revocation of its license can take place on that

ground; neither can the license be revoked because a case has been taken by a writ of error from the supreme court of the state to the federal court of the United States for the purpose of litigating federal questions that may arise in the case. The restriction of the provision is further limited to causes of action that arise within the State of Wisconsin. Only when cases that have been started by citizens of the state against a foreign corporation in a court of the state on a cause of action arising within the state are removed to either the district or circuit court of the United States, then its license must be revoked. This is for the purpose of placing the foreign corporation on exactly the same basis as a domestic corporation.

Without this provision in the statute, a foreign corporation, such as the complainant, may remove every action that may arise in the State of Wisconsin brought against it by a citizen of the state from the state court to the district or circuit court of the United States. Such corporation may, therefore, entirely take away from every citizen of the state the right to have a controversy that arises between it and such citizen determined and tried in the courts created for that purpose by the constitution and statutes of the state. It may entirely take away from the state courts the right to try any such cases.

This is possible simply because a foreign corporation is a citizen of another state. A domestic corporation cannot remove a case

from a state court to the district or circuit court of the United States unless a federal question is involved, for the reason that a domestic corporation is a citizen of the State of Wisconsin. The result is, that all statutes enacted in the State of Wisconsin as to court procedure, and as to the methods of enforcing claims of the citizens of the state against corporations, may be successfully circumvented by a foreign corporation by removing all of its cases to the federal courts. As an illustration, we direct the court's attention to section 4096 of the Wisconsin statutes providing for the adverse examination of the officers and employees of corporations prior to the trial, and requiring the production of the books of the corporation, which is a statute that has shown itself to be of great value in litigations against corporations and to be entirely reasonable and just in its requirements.

Another example is ch. 219, Laws of 1915, being an act to simplify and expedite legal procedure, and enacted by the last legislature of the state on recommendation of the board of circuit judges and judges of the supreme court. If the statute in question herein is declared unconstitutional, then the state is powerless to enact any law which shall improve in any way the procedure in court and reach foreign corporations doing an intrastate business within its borders. The statutes enacted to secure to the citizens of the state the remedial rights guaranteed to them by the constitution can

be successfully circumvented by a foreign corporation, while a domestic corporation of like nature doing both domestic and interstate business, and which, perchance, may be exercising functions as an agent of the federal government the same as a foreign corporation is subject to these local laws.

Under the provisions of the state laws, a citizen of the State of Wisconsin may bring an action against a domestic corporation in any county in the state where he may reside and where the corporation transacts business. The action may be tried, as a general rule, in the county in which the witnesses of the plaintiff are located. A removal of the action to the United States court will harass such a citizen and will cause not only delay in the suit but also additional expense and other inconveniences. The court will take judicial notice of the fact that some of the counties in the state are located a great distance from the federal courts. These matters are so well known that legislators and courts have taken notice of the fact, the legislature enacting statutes as the one under consideration designed to remedy the defect and courts giving free expression to these matters. Judge Sanborn and Judge Geiger made candid statements of it in the opinion filed deciding the instant case, in which they say:

> "Provisions designed to prevent the removal of causes to federal courts, like that of section 1770*f* and the insurance statute

under review in *State ex rel. Drake v. Doyle*, 94 U. S. 535, 24 L. Ed. 148, were found necessary by the unreasonable and oppressive conduct of the foreign corporations themselves in removing cases merely for greater delay, vexation and expense. It used to be common practice in Wisconsin for foreign corporations under injunction from state courts to remove the case on a Saturday afternoon, thus *ipso facto* vacating the state injunction, and then hustle a gang of men upon the enjoined work and get it done by Monday, before any other restraining order could issue." (Trans. p. 22.)

The supreme court of the State of Wisconsin, in *State ex rel. Drake v. Doyle*, 40 Wis. 175, 194, through Justice Ryan, used the following language:

"The statute extended to these foreign insurance companies the privilege of doing business in this state on equal footing with domestic companies. Experience showed their powers to harass the citizens of the state doing business with them by removing actions on their policies from courts of this vicinage to distant and expensive tribunals. Hence the provisions of both statutes. And, conceding to the fullest extent the right of removal of actions commenced, we can see no pretense for questioning the power of the state, in the exercise of its absolute discretion on the subject, to revoke the license of a company exercising the right. The state has power to make its voluntary license subject to forbearance of a right, and revocable upon its exercise."

Judge Vinje, in a later case, that of the *Independent Tug Line v. Superior L. & B. Co.*, 146 Wis. 121, 123, speaking of sec. 1770*b*, said:

> "The conditions of the section in question are imposed upon foreign corporations for the purpose of protecting our citizens in their dealings with each other, viz., to have the right to sue them in the courts of this state in respect to any liability arising out of any business contract or transaction within the state—surely not an unreasonable condition. Nor is the burden of complying with the statute an onerous one."

It will readily be seen that, without this provision under consideration, a foreign corporation can do business in the State of Wisconsin under better conditions than a domestic corporation is permitted to do. No citizen of the state can enforce against a foreign corporation his rights and have the advantage of the statutes enacted as to the procedure in court; nor can he have the advantage of the courts created by the state to secure his constitutional and legal rights. It needs no argument in this court to impress it with the importance of the remedial rights of the citizen of a state. They are of the greatest importance and have been guaranteed to him by constitutional enactments. It is our insistence that the state has the right to enact all laws that have for their object and effect the placing of foreign corporations on the same footing as domestic corporations. The state has a right to require foreign corporations to be subject

to the same laws as to procedure as a domestic corporation, if the foreign corporation is attempting to do business within the state.

In other words, a sovereign state has the right to impose such conditions upon a foreign corporation for doing intrastate business as will place such foreign corporation on a footing with similar domestic corporations transacting the same business. However, this phase of the argument will be taken up later, when the constitutional basis upon which our contention is predicated will be definitely set forth.

It has been suggested and argued in the lower courts that, because a domestic corporation may remove a case where a federal question is involved from the state court to the federal court, this statute is discriminatory against foreign corporations on the ground that a foreign corporation has not the right to remove a case to the district court, on the same grounds. At first blush this would seem to be a discriminatory provision, but, upon careful consideration, it is apparent that no substantial rights of a foreign corporation are interfered with and that no substantial rights are given to a domestic corporation by this phase of the law. A foreign corporation is not deprived of the right to have the federal question in any case decided by the United States court for the reason that any case may be taken on a writ of error to the United States supreme court after the state court has passed upon the question, for the purpose of

determining the federal question. For that reason it was considered by the lawmakers as not a discrimination against foreign corporations to provide that their license should be revoked if they would remove a case to the federal court.

The legislature could not pass a valid law prohibiting domestic corporations from removing a case to the federal court when a federal question is involved. The object of the law here in question was not to oust the federal court of any jurisdiction, but to place foreign corporations on the same footing as domestic corporations, and it was thought to be superfluous to enact a law ousting the federal court of the jurisdiction to try the actions of domestic corporations where a federal question was involved when the foreign corporations were not deprived of the right to have the federal questions decided by the federal court. If this should be considered as a discrimination against foreign corporations, it is so shadowy that it should not decide this case in favor of the complainant. On this point the trial court in its opinion said:

> "The only discrimination we are able to perceive in the Wisconsin law, in favor of domestic and against foreign corporations, is a very narrow one. Foreign corporations are not allowed to remove cases against them by citizens of Wisconsin, on causes of action there arising. The same rule applies to domestic corporations under section 28 of the Federal Judicial Code, which does not

allow defendants to have removal for diverse citizenship unless they are non-residents of the state. Hence domestic corporations cannot exercise such a right. If, however, the suit against the domestic corporation presents a federal question, and more than $3000 is in dispute, it may remove the case, though a citizen and resident of the state, and though the plaintiff is a citizen of the same state and the cause of action arose therein. To this limited degree there is discrimination; but instances of such cases would be very rare. The question of the right to remain in the state may also be litigated by the foreign corporation in the state courts, with a final right of review in the supreme court by writ of error to the highest state court. It is unnecessary on these motions for injunctions to pass on this narrow question because a consideration of the second point referred to seems to require the court to direct the temporary injunctions prayed." (Trans. p. 21.)

On this point this legislation is within the rule laid down in the cases of *Security Mutual Life Insurance Company v. Prewitt*, 202 U. S. 246, and *Doyle v. Continental Insurance Company*, 94 U. S. 535.

In both of these cases the same discrimination was present in the statute and the court did not consider the same as a substantial discrimination, for in the former case, at page 257, the court used the following language:

> "The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones doing business in Kentucky."

In those cases the fact that a domestic corporation could remove a case in which a federal question was involved to the federal court, and that the federal corporation could not remove such a case to said court on the same ground, was not considered as a substantial discrimination, for the state is not depriving the foreign corporation from having the federal question settled in the federal court. As an offset to this advantage the foreign corporation may bring an action in the federal court when no federal question is involved, which a domestic corporation cannot do. The lawmakers evidently considered this form of the enactment the most practical and most easy of administration. It would be difficult to frame a law in which equality could be more nearly attained than in the law in question.

III.

The Mandate of the Fourteenth Amendment to the Constitution of the United States, that no State shall Make or Enforce any Law which shall deny to any Person within its Jurisdiction the Equal Protection of the Laws, is Applicable to Remedial Rights.

The equal protection of the law is denied by a state court when it is apparent that the same law or course of procedure would not

and could not lawfully be applied to any person in the state under similar circumstances. *Ex parte Stricker*, 109 Fed. 150. That persons belonging in the same class should have equal access to courts is required under the Fourteenth Amendment.

In the case of *Barbier v. Connolly*, 113 U. S. 27, Justice Field, speaking for the court, said:

> "The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts;* that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." (Italics ours.)

In the case of *Railway Co. v. Ellis*, 165 U. S. 150, the statute under consideration allowed an attorney's fee of $10 to be taxed in the costs in case of recovery in favor of a plaintiff having a claim of less than $50 against a railway company, not paid within thirty days after its presentation, for labor, damages, overcharges or for stock killed or injured, and the act was held to be in contravention of the Fourteenth Amendment because denying equal protection of the law as it applied only against railway companies and in favor only of persons having certain demands not to all alike. The Fourteenth Amendment by Brannon, 335.

A statute in California gave a lien for wages to laborers and required payment of such wages once a month. It was held void under the Fourteenth Amendment as class legislation applicable only against corporations and in favor of their employees.

Johnson v. Goodyear, 59 Pac. 304.

A statute may not constitutionally give a lien to certain persons named therein.

8 Cyc. 1076;
Randolph v. Builders, etc. Supply Co.,
106 Ala. 501, 17 South. 721.

"State courts may be arranged, jurisdiction fixed, the procedure fixed, the effects of their judgments declared and one law made operative in one section of the state, another in another section, without its being considered denial of equal protection under the amendment, if the legislation touching

the same be applicable to all alike under like circumstances."

The Fourteenth Amendment by Brannon, 343, citing *Mo. v. Lewis*, 101 U. S. 22.

A state under republican form of government is as imperatively bound to give equal remedial rights as it is to impose equal burdens and obligations.

Brief of Counsel in *Mo. v. Lewis*, 101 U. S. 22, 27, and cases cited.

In the case of *Durkee v. City of Janesville*, 28 Wis. 464, this court held:

"As a rule acts of the legislature exempting particular individuals or corporations by name from the operation of general laws are not within the proper scope of the legislative power and are void."

This was a case in which a law which exempted the city of Janesville from costs in certain cases where other corporations or persons were liable was under consideration by the court and declared unconstitutional. The court said at page 465:

"By an amendment of the charter of the city, P. and L. Laws of 1862, ch. 107, sec. 15, and a further amendment, P. and L. Laws of 1869, ch. 298, sec. 8, it is declared that no cost shall be recovered against the city in any action where the same is commenced to set aside any tax assessments or tax deed, or to prevent the collection of taxes or assess-

ments in said city. It is said in answer, that these provisions of the charter are inoperative and void, because in violation of that principle of constitutional law which prohibits unequal and partial legislation upon general subjects—the enactment of a special law dispensing with the general law in a particular case, or granting to one man or corporation, by way of exemption from the operation and effect of a general law, a privilege or indulgence which no other person or corporation has or enjoys. There is no reason to doubt the existence or correctness of the constitutional principle, which forbids such legislation. Enactments of the kind have frequently been held unconstitutional and void. In *Bull v. Conroe*, 13 Wis. 238, 244, it was held by this court that the general laws exempting property from seizure and sale on execution could not be varied for particular cases and localities. An act suspending the statute of limitations in favor of an individual has been held invalid. *Holden v. James*, 11 Mass. 396. And so an act 'empowering' a judge of probate to take an administration bond in a mode differing from that prescribed by the general laws of the state. *Ricquet, Appellant*, 5 Pick., 65. Also an act granting an appeal from the decree of the probate court in a particular case, contrary to the provisions of the general law. *Lewis v. Webb*, 3 Greenl., 326. An act to grant a review in a suit between private citizens. *Durham v. Lewiston*, 4 Greenl., 140. An act making it a felony in the officers, agents or servants of a particular banking corporation, to embezzle or appropriate without authority the funds of the corporation, was adjudged a partial law, and unconstitutional and void, because

it did not embrace all persons in like state, and surrounded by similar circumstances. *Budd v. The State*, 3 Humph. 483. And the same was determined of an act authorizing the court to dismiss Indian reservation cases, when prosecuted for the use of another. It was a partial law, intended to operate only upon a few individuals. *Wally's Heirs v. Kennedy*, 2 Yerg., 554. And so also of an act creating a special court for the determination of suits commenced by a particular bank against its officers, and other persons in default to it. *State Bank v. Cooper*, 2 Yerg., 599. An act authorizing the executors of one person deceased to revive a judgment obtained by another person in his life time, in their names by *scire facias*, was decided to be partial in its character, and not the law of the land, and void. *Tate v. Bell*, 4 Yerg., 202. And likewise an act authorizing a particular person named to prosecute a suit then pending in the name of the deceased party plaintiff, without taking out letters of administration upon the estate of such deceased. *Officer v. Young*, 5 Yerg., 320. And so also an act which authorized the guardians of the minor heirs of a deceased person to sell lands which descended to the heirs from their ancestor, and apply the proceeds in payment of the ancestor's debts, though passed with the assent of such minor heirs, was held unconstitutional and void. *Jones' Heirs v. Perry*, 10 Yerg., 59. And see also *Simonds v. Simonds*, 103 Mass. 572.

"The principle thus clearly shown by the decisions, if applicable to the acts under consideration, seems conclusive against their validity. And I think they are invalid. Certainly no discrimination more arbitrary,

unjust and odious, between one individual or corporation and another, or every other, in a matter where the rights and privileges of all should be equal, could well be, than would thus be established, if such acts were valid. The city of Janesville would have a special privilege or advantage not given to any other like corporation under the same circumstances."

At page 470 the court continued:

"And if the legislature might thus exempt the *city of Janesville* from the operation of a general law, or from burdens cast upon all other corporations and persons, under like circumstances, then why might it not, in like manner, exempt any other corporation or person by name, thus opening the door to the greatest corruption, partiality and favoritism? It is not perceived where acts of this kind would end, if once begun, and held to be a legitimate exercise of legislative power."

And at page 471:

"Certainty of remedy implies uniformity of remedy and equality of rights and privileges in all things respecting it, which can only be obtained by general laws, equally binding upon every member of the community. The language denotes that there can be but one remedy for all similar cases, which must operate upon all persons or parties alike, and be equally free and favorable to all."

See also:

City of Janesville v. Carpenter, 77 Wis. 288;
State ex rel. Kellogg v. Currens, 111 Wis. 431.

In the case of *Southern Railway Co. v. Green*, 216 U. S. 400, it was held that a corporation which comes into the state other than that in which it is created, pays taxes thereto, and acquires property, and carries on business therein, is within the jurisdiction of that state, and, under the Fourteenth Amendment, is entitled to protection against any statute of that state, depriving it of the equal protection of the law.

The same principle is applicable to a domestic corporation.

It was also held in that case that a classification, which divides corporations doing exactly the same business with the same kind of property into foreign and domestic, in a tax law, is arbitrary, and a denial of equal protection of the law. The peremptory requirements of the Fourteenth Amendment, of equality to all persons within the jurisdiction of a state, belonging to the same class, requires a state, when it empowers these artificial persons to do intrastate business within its borders, to place them on substantially an equal footing.

IV.

The Rule of Comity goes only so far as to place Foreign Corporations on an Equal Basis with Domestic Corporations, but never Beyond.

Thompson on Corporations, (2d ed.) vol. 5, § 6628, expresses this rule in the following language:

> "The principle of comity permits a foreign corporation to exercise only those powers within the state which a domestic corporation of the same kind is permitted to exercise under the constitution, the laws and the policy of the state, and such a corporation may not exercise powers and privileges which were denied to domestic corporations of like character. It is another expression of the principle to say that a foreign corporation will not be allowed to transact business within the state on more favorable conditions than prescribed by law for domestic corporations though it is given authority to do such acts by the laws of the state of its incorporation."

The same principle was laid down in the case of *Clark v. Central Railway Company*, 50 Fed. 338, as follows:

> "Comity between the states will not authorize a foreign railroad corporation to exercise powers within the state which a domestic corporation would not be permitted

to exercise under the constitution and policy of the state." (Syllabus.)

In *Van Steuben v. New Jersey Central Railway Co.*, 178 Pa. St. 367, at page 373, the following language was used:

> "A corporation being the mere creature of local law can have no legal existence beyond the limits of the sovereignty where created. The recognition of its existence even by other states, and the enforcement of its contracts made therein depend purely upon the comity of these states, a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interest or repugnant to their policy."

The supreme court of the State of Wisconsin in the case of *Presbyterian Ministers Fund v. Thomas*, 126 Wis. 281, at page 285 said:

> "The rule of comity claimed by respondent would place foreign corporations on more favorable ground in the transaction of insurance business with residents of this state than domestic corporations and foreign corporations duly licensed. The rule of comity does not go to this extent." Citing:
>
> 6 Thompson, Corp. § 7885;
>
> 2 Morawetz, Private Corp., (2d ed.) § 965;
>
> *Empire Mills Co. v. Alston G. Co.*, (Tex. App.) 15 S. W. 200;
>
> *Bank of Augusta v. Earle*, 13 Pet. 519, 592.

In the case of *Horn Silver Mining Co. v. New York*, 143 U. S. 305, at page 315, the court said:

> "It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

Quotations from courts of last resort might be multiplied almost indefinitely to the same effect as the above holding that the rule of the comity does not go so far as to permit a foreign corporation to exercise powers within the state that a domestic corporation of the same kind is not permitted to exercise under the constitution, laws and policy of the state.

We content ourselves in calling the court's attention to the following authorities:

Hiskey v. Pac. States Savings etc. Co., 27 Utah, 409;
Fowler v. Bell, 90 Tex. 150;
Coler v. Tacoma R. Etc. Co., 65 N. J. Eq. 347;
White v. Howard, 46 N. Y. 144;
Falls v. U. S. Savings, Loan, etc. Co., 97 Ala. 417;
Walters v. Whitlock, 9 Fla. 86;
Harding v. Am. Glucose Co., 182 Ill. 551;
U. S. Mort. Co. v. Gross, 93 Ill. 483;
Faulker v. Hyman, 142 Mass. 53;
People v. Howard, 50 Mich. 239;
State v. Cook, 171 Mo. 348;
Toomey v. Supreme Lodge K. P. W., 74 Mo. App. 507;
Fisher v. Lord, 63 N. H. 514.

V.

The Rule of the Doyle and Prewitt Cases, Properly Qualified and Limited in its Scope, is Applicable to this Statute and is Sufficient to Sustain its Constitutionality.

The first case in this court in which the question presented in the instant case was squarely before the court was a case that originated in the State of Wisconsin, that of *Insurance Company v. Morse*, 20 Wallace, 447. The insurance laws enacted in 1870 contain the provision that before any foreign insurance company was permitted to do business in the state it should "first appoint an attorney in the state on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States circuit court or federal court and file in the office of the secretary of state a written instrument duly signed and sealed certifying such appointment, which shall continue until another attorney shall be substituted." The Home Insurance Company of New York established an agency in the state and appointed H. S. Durand as its agent on whom process might be served.

The power of attorney thus filed contained this clause:

> "And said company agrees that suits commenced in the state courts of Wisconsin shall not be removed by the acts of said company into the United States circuit or federal courts."

An insurance policy was issued to one Morse, and a loss having occurred under it, Morse sued in the county court of Winnebago county, one of the said courts of Wisconsin, to recover the amount alleged to be due on the policy. The company entered its appearance and filed its petition to remove the case in proper form as was required by the United States statute. The petition was accompanied by the required bond and bail. The state court in which the suit was brought held that the statute of the state above quoted, and the agreement under it, justified a denial of the petition. It was therefore denied and a trial was had and judgment given to the plaintiff for the claim sued for. The case was taken to the supreme court of the state and affirmed (30 Wis. 496). Thereupon the insurance company brought the case to this court on writ of error. This court held that the Wisconsin statute in question was repugnant to the constitution of the United States and the laws in pursuance thereof, and that the agreement of the insurance company, filed in pursuance of the act, derived no support from a statute thus unconstitutional, and was as void as though no such statute had been passed.

Subsequent thereto an action was started in the name of the state on the relation of one

Drake against the secretary of state in the supreme court to compel the secretary of state to revoke the license of the Continental Insurance Company of New York on the grounds that said company had removed a case started against it in the circuit court for Winnebago county to recover the amount of damages caused by the destruction of property which was insured by the defendant. In that case a mandamus was issued to the secretary of state requiring him to revoke the license of the insurance company. The court held that, although the agreement made by the company not to remove a case to the federal court started by a citizen of the state against it in one of the state courts was void because repugnant to the constitution of the United States, the statute requiring the secretary of state to revoke the license, however, upon such removal in the same act was constitutional. See *State ex rel. Drake v. Doyle*, 40 Wis. 175. A distinction was drawn between the validity of the agreement and the validity of the statute as a whole. The opinion was written by Chief Justice Ryan, one of the brightest intellects that has ever graced a court of a sovereign state, and the rule was there first announced that a state had the absolute right to say upon what terms a foreign corporation should be permitted to do intrastate business within the borders of a sovereign state, and that although the state had not the right to prohibit a foreign corporation from removing cases started against it in

state courts, by citizens of the state, to the federal court, the state did have the right to revoke the license if such removal were exercised. Thereupon an injunction was secured from the federal court of the western district of Wisconsin, restraining the secretary of state from revoking the license. This case was appealed to the supreme court and is reported as *Doyle v. Continental Insurance Company*, 94 U. S. 535. In that case this court took practically the same position as was taken by the supreme court of the state of Wisconsin in the case of *State ex rel. Drake v. Doyle, supra*, and held that, although the agreement made by the company that it would not remove a case to the federal court was void, the condition in the statute, which required the secretary of state to revoke the license if a removal were actually made, was valid.

In deciding said case the court used the following pertinent language:

> "The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a state is always revocable. *Rector v. Philadelphia*, 24 How. 300; *People v. Roper*, 35 N. Y. 629; *People v. Comrs.*, 47 N. Y. 501. * * *
>
> "A license to a foreign corporation to enter a state does not involve a permanent right to remain, subject to the laws and constitution of the United States. Full power and control over its territories, its citizens and its business belong to the state.

"If the state has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. * * *

"If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a state are subject to still less inquiry, either as to the act itself or as to the reason for it. * * *"

Again the court said:

"The statute of Wisconsin declares that if a foreign insurance company shall remove any case from its state court into the federal courts, contrary to the provisions of the act of 1870, it shall be the duty of the secretary of state immediately to cancel its license to do business within the state. If the state has power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made.

"It is said that we thus indirectly sanction what we condemn when presented directly, towit: that we enable the state of Wisconsin to enforce an agreement to abstain from the federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the state may compel the foreign company to abstain from the federal courts or cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state; that state has authority at any

time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice or the wrong that is alleged to exist, must determine the question."

Subsequently, the case of *Barron v. Burnside* was decided in 121 U. S. 186. It was held that the statute of Iowa, which required that every foreign corporation named in the act shall, as a condition of obtaining a permit for the transaction of business in Iowa, stipulate that it will not remove into the federal court certain suits which it would by the laws of the United States have a right to remove, is void because it makes the right to a permit dependent upon the surrender by a foreign corporation of a privilege secured to it by the constitution and the laws of the United States.

The case of *Doyle v. Continental Insurance Company*, 94 U. S. 535, was not expressly overruled in this case, but was distinguished.

Later a statute of the State of Kentucky came before this court in *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. Ed. 1013. This statute, which is known as Act 631 of the Kentucky statutes, contained, among other things, the following:

"And, if any company shall, without consent of the other party to any suit or proceeding brought by or against it, in any court of this state, remove such suit or proceeding to any federal court, or shall insti-

tute a proceeding against any citizen of this state in any federal court, it shall be the duty of the commissioners to forthwith revoke all authority to such company and its agents to do business within this state."

This statute was held to be good. In this case will be found a careful analysis of the decisions in the cases of *Home Insurance Company v. Morse; Doyle v. Continental Insurance Co.*, and *Barron v. Burnside*, and other cases. The court said at page 1018:

"It has not been decided that a statute which has no requirement for a stipulation or agreement not to remove is void, if there be simply a provision therein for a revocation of the permit, such as is contained in the statute under review.

"As a state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial.

"Counsel for the companies, in their brief, admit that the state has the right at any time to pass a statute expelling a company or revoking its license, and the validity of the statute or expulsion would not be affected by the motives of the state in so doing, even though the preamble expressly recited that the license was revoked because the company had removed a case. The statute would be valid—for the company had no constitutional right to remain in the state any longer than it

chose to allow; and the statute would not abridge any right of removal—for, as the case had already been fully removed before the statute was in existence, the right of removal could not be said to have been hindered or abridged by a statute not even in existence.

"Thus it is admitted that a state has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the companies deny is the right of a state to enact in advance that if a company remove a case to a federal court its license shall be revoked.

"We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with domestic companies doing business in Kentucky. No stipulation or agreement being required as a condition for coming to the state, and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into a federal court, your right to further do business within the state shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the Doyle Case, we think is good."

This case has been quoted with approval in a number of subsequent decisions in the supreme court of the United States.

National Council v. State Council, 203 U. S. 163;

Swing v. Weston Lbr. Co., 205 U. S. 278.

It is true that this rule was stated broader by the supreme court than it was necessary to state it, and in subsequent decisions it was found necessary to distinguish or modify it.

In *Western Union Telegraph Company v. State of Kansas*, 216 U. S. 1, a statute of Kansas provided, among other things, that before a corporation of another state should be given authority to do local business in Kansas it should pay to the state treasurer for the benefit of the permanent school fund a charter fee of one-tenth of one percent of its authorized capital upon the first one hundred thousand dollars of its capital stock, or any part thereof, or upon the next four hundred thousand dollars, or any part thereof, one-twentieth of one percent, and for each million dollars or major part thereof, over and above the sum of five hundred thousand dollars, two hundred dollars. The Western Union Telegraph Company had a capital stock of one hundred thousand dollars. The fee demanded of it as a condition of its right to do local business in Kansas was twenty thousand dollars. The state brought suit in one of its own courts against the company and sought a decree ousting and restraining the company from doing any local business in that state. The court gave the relief asked for, but the supreme court of the United States reversed the decision. It was held that this was a tax and a burden upon interstate commerce and the court could not give relief without giving

effect to a condition that was in violation of the federal constitution.

The same question was before the court in the case of *Pullman Co. v. Kansas*, 216 U. S. 56. An attempt was made to tax interstate commerce by exacting the payment of a tax as a condition precedent to the right of the corporation to do intrastate business. The court held that this could not be done; that interstate commerce could not be taxed by the state, either directly or indirectly; and that, as there is a special provision in the United States constitution delegating the regulation of such commerce to the United States, the state has no right to subject such commerce to any burdens whatever.

In the case of *Ludwig v. Western Union Telegraph Company*, 216 U. S. 146, the secretary of state was enjoined from revoking the license of the company, on the ground that the company had not paid the tax that was levied on interstate commerce as a condition precedent to continuing to do local business in the state.

In the case of *Southern Railway Company v. Green*, 216 U. S. 400, it was decided that, whatever power a state may have to exclude or determine the terms of admission of foreign corporations not already within its borders, it cannot subject a foreign corporation, already within the state in compliance with its laws and which has acquired property of a fixed permanent nature, to a new and additional franchise tax for the privilege of doing business

which is not imposed upon domestic corporations; that this would be an unconstitutional denial of equal protection of the law, under the Fourteenth Amendment.

The learned counsel for the complainant in the instant case are placing great weight upon the case of *Herndon v. Chicago, Rock Island & Pacific Ry. Co.*, 118 U. S. 135, in which the secretary of state of Missouri was restrained from revoking the license of the defendant in that action for the reason that it had removed a case from the state court to the federal court. In that case, however, it appears that the statute in question was placing upon interstate commerce an unnecessary burden which was declared unlawful and in violation of the constitution of the United States.

It must be borne in mind that the statute in the State of Missouri prohibited the foreign corporations from instituting any suit or proceeding against any citizen of the state in any federal court and from removing, without the consent of the other party in writing, any suit or proceeding brought by or against it in any court of the said state. It was apparent in this case that the legislation was discriminatory against foreign corporations. The defendant could not institute or bring suit in any federal court against any citizen of that state, nor any proceeding whatever. It was ousting the federal courts of jurisdiction of all cases in which citizens of the state might be a party. Not only actions or proceedings that

were found upon causes originating in the state, but all suits and all proceedings were prohibited from being taken to the United States court. The prohibition was not limited to suits and proceedings in the district or circuit courts, but it included those in the supreme court. It was very evident that this was discriminatory. It even took away the right to have the federal court pass on a federal question. The statute in the State of Wisconsin has no resemblance to such a law. It was very evident that the Missouri act was not passed for the purpose of putting foreign corporations on an equal footing with the corporations of the state.

Great stress is also laid upon the case of the *Western Union Telegraph Company v. Julian*, 169 Fed. 166. It will be observed, however, that the statute in that case, requiring the forfeiture of the license of the foreign corporation for removing a case to the federal court or instituting a case or proceeding in the federal court, was unconstitutional by reason of the following provision in the constitution of Alabama:

> "All corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."

The court held that the statute in question was void as violative of the said provision of the state constitution. It follows that it was not necessary in that case to decide whether that statute is in violation of the constitution

of the United States because it was a void statute, and everything said on that point in said case was *obiter dicta.* This case was not passed upon by this court. Later cases cited by counsel we contend are not in point.

In the case of *Harrison v. St. L. & San Francisco R. R. Co.*, 232 U. S. 318, this court held that a state cannot destroy the right to remove causes to the federal court by imposing arbitrary conditions as to state citizenship which render it impossible for one entitled to the right to avail of it. This somewhat unique and complicated statute of the State of Oklahoma was declared unconstitutional and the *Doyle* and *Prewitt Cases* were distinguished, and it was said that the rule in those cases had an extremely narrow scope.

Having reviewed the decisions of the court, we now come to a consideration of the present status of the rule as laid down in the *Doyle* and *Prewitt Cases* and as distinguished and modified by subsequent cases. It must be borne in mind that in none of these subsequent cases has this court expressly overruled the doctrine announced in said cases. In making practical application of the principle to different cases as they arose from time to time and in construing certain statutes somewhat similar to those in the said cases, this court has found it necessary to greatly diminish the scope in which said rule is now held operative.

This court has intimated that this rule has a very narrow application at the present time and is probably only applicable to insurance

cases. It must be remembered, however, that in the *Doyle* and *Prewitt Cases* the rule was laid down in general terms as applicable to all foreign corporations and not limited to insurance corporations. We believe we have shown in this brief that the reasons for a law of this nature are just as potent and necessary against foreign corporations doing an interstate business in the state as they are against foreign corporations doing an insurance business. This law attempts to place a foreign corporation doing an interstate business on an equal footing with a domestic corporation which also is doing an interstate business. When both corporations are engaged in intrastate business, the domestic corporation, although it is engaged in interstate business, has not the right to remove to the federal court cases started against it by citizens of this state, where the cause of action arises within the state, unless a federal question is involved.

A foreign corporation doing an interstate business, which is also licensed to do intrastate business in this state, can therefore transact like business under more favorable conditions than a domestic corporation. They are not on an equal footing. This statute places them on a substantially equal basis.

In the later cases above referred to, the rule that a state cannot attach unconstitutional conditions to a license given to a foreign commercial corporation to do interstate business within its borders has been given a new sanc-

tion. And in this connection it is well to state that the right to remove a case to the federal court by a foreign insurance company is just as sacredly guarded by the constitution and statutes of the United States as it is for any other corporation. These guaranties apply to all foreign corporations including insurance as well as others. Other constitutional guaranties are equally applicable to foreign insurance companies.

We believe that, if at the present time the State of Wisconsin should enact a law requiring a foreign insurance corporation, duly licensed to do business in Wisconsin, to pay an unconstitutional and discriminatory tax as a condition for continuing to do business in the state, and requiring the secretary of state to revoke the license if such tax were not paid, this court would find it necessary to declare such statute unconstitutional on the authority of the recent cases modifying the rule in the *Doyle* and *Prewitt Cases*. It may well be argued that, if the state has a right to make one condition which is violative of the United States constitution, it may impose other conditions that are also violative of the constitution.

As was well said in the dissenting opinion of Justice Day in the *Prewitt Case*, at page 267:

> "If the State may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this

case, that the right of the state to exclude, includes the right, when exercised for any reason or for no reason, the state may say to the foreign corporation,—You may do business within this State, provided you will yield all right to be protected against deprivation of property without due process of law; or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws; and so on through the category of rights secured by the Constitution and deemed essential to the protection of people and corporations living under our institutions."

It is our contention that there are two distinct provisions of the constitution of the United States involved in this question instead of one, one provision being as follows:

"This constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.

"The judicial power of the United States * * * shall extend to * * controversies between citizens of different states."

And the second being the provision contained in the Fourteenth Amendment to the United States constitution that no state shall pass any law denying to any person the equal protection of the law.

We have shown heretofore in this brief, we believe, that the statute in question in the instant case is necessary for the purpose of placing a foreign and a domestic corporation doing intrastate business in Wisconsin on an equal basis. We know of no way in which that can be done other than by a statute like the one here in question, or very similar thereto. The mandates of the Fourteenth Amendment that no state shall pass any law denying to any person within its borders the equal protection of the law is violated if the state passes laws permitting foreign corporations to come within its borders and compete with domestic corporations in intrastate business on an unequal basis. We therefore contend that the Fourteenth Amendment authorizes the enactment of a statute that has the effect of placing the two corporations on an equal basis and that the rule laid down in the *Doyle* and *Prewitt Cases* should be, therefore, modified to the extent that the condition attached must not be violative of any provision of the constitution of the United States unless authority is found for its enactment in some other provision of the constitution of the United States. The two provisions of the constitution applicable to the law under consideration are in *pari materia* and must be considered together. We contend that if so considered and applied to this Wisconsin statute the same may be upheld as constitutional and as being an exception to the rule that no condition can be attached to the

license of a foreign corporation to do interstate business which is violative of a certain provision of the constitution of the United States, and the exception being predicated upon the peremptory requirements of the Fourteenth Amendment.

It is our insistence that the supreme court of the United States should not hold that a state may not revoke the license of a foreign corporation, authorizing it to do intrastate business in this state simply because such corporation is also doing an interstate business or doing business as an agent of the federal government. It is true that in a number of the decisions from which quotations were made by the learned counsel for the complainant emphasis was laid upon the fact that interstate commerce was interfered with and that the state had no right to interfere with such commerce. This was true simply because the cases under consideration were cases in which the state tried to interfere with interstate commerce.

We believe that the language of Chief Justice Marshall in the case of *Cohens v. State of Virginia*, 6 Wheaton, 399, is here apropos:

> "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The

reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The specific provision of the statute here in question and other similar statutes that have the same effect, and are passed for the purpose of placing foreign corporations on substantially an equal basis, might well be sustained by this court under the provisions of the Fourteenth Amendment and under the well determined right of a state to exclude a corporation doing intrastate business within its borders. We fear that an adverse decision by this court will have an injurious effect upon the business of the country, and will hamper the arm of the state in protecting the rights of its citizens. Such a ruling would have the effect of making it impossible for the state to place foreign and domestic corporations on an equal footing within the state, and corporations would not organize hereafter in states where they intend to do a local business. They would organize in other states in which they do not intend to do such business and enter those states in which they desire to do business as a foreign corporation. It will thus take away from the state its visitorial powers and effectually curb the state in the enactment of laws designed for the protection of its own citizens.

So-called "tramp" corporations will be organized throughout the country, for they can successfully defy the states in which they operate as foreign corporations.

VI.

A Foreign Corporation is not Required by the Statutes of Wisconsin, as a Condition for Receiving a License in the State of Wisconsin, to Stipulate that it Will not Remove a Case to the Federal Court.

It was held by the trial court that the provision in par. (f), subsec. 7, sec. 1770*b*, to the effect that such corporation by its president, secretary or general manager shall make and forward to the secretary of state, with the articles of incorporation above provided for, a statement duly sworn to "that such corporation, as a condition of its being permitted to begin or continue doing business within the state, shall comply with all the laws of the state with regard to foreign corporations" and a similar provision in par. (h), subsec. 3, is the equivalent to the requirement of a stipulation or agreement by a foreign corporation that it will not remove a case to the federal court.

The case of *Barron v. Burnside*, 121 U. S. 186, is relied upon, in which the statute required that the application for the permit should contain "a stipulation that said permit

shall be subject to each of the provisions of the act."

That statute also contained a similar provision to the one contained in our statute as to the forfeiture of the permit in case corporations should remove a case to the federal court. It will be observed that in that case it is expressly stipulated that the permit granted should be subject to the provisions of the act; that it should be forfeited if the corporation removed a case to the federal court. This was construed by the court as a stipulation that the corporation would not remove a case to the federal court. Our statute does not use the same or similar language. The statute here provides that the corporation shall state in a sworn statement that it will comply with all the laws of the state with regard to foreign corporations. The same statute makes specific provision of affirmative acts that the corporation is required to do as a condition for doing business in the State of Wisconsin. It must file its articles of incorporation together with a certain statement with the secretary of state; it must file annually a report of its business; it must pay a certain specified fee upon the filing of its articles of incorporation; it is required to pay a certain specified fee upon the amendment of its articles; it is prohibited from entering into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or com-

modity in general use in the state under sec. 1770*g* of the statutes.

We contend that it is these positive requirements that the corporation is promising to comply with and that it is not the intention of this statute to exact from it a promise that it will not remove any case to the federal court. This is apparent from the fact that this statute does not contain an express provision forbidding the foreign corporation from removing a case to the federal court, and a similar provision to that of this act requiring the forfeiture of the articles when a case is removed was construed by the court in the *Doyle Case* as leaving it optional with the foreign corporation whether it would or would not remove the case. It thus appears that the foreign corporation may comply with this law when it removes the case as well as when it does not remove the case. It is given the option to remove it or to refrain from removing it. If it removes the case it is still within its rights under the statute and is complying with the law. If it does not remove the case it is also complying with the law.

We contend that this provision of the statute has been given a very strained construction by the trial court and that it does not bear such construction. It is held by the trial court that the statute so construed makes this, as well as the provision of sec. 1770*f*, unconstitutional.

It is a cardinal rule of construction that when a statute is susceptible of two construc-

tions, one of which supports the act and gives it effect and the other renders it unconstitutional and void, the former will be adopted even though the latter will be the more natural interpretation of the language used.

United States v. Coombs, 12 Peters, 75;
United States v. Central Pacific Ry. Co., 118 U. S. 235;
Missouri v. Kansas City, etc. Ry. Co., 32 Fed. 722;
Granada County v. Brogden, 112 U. S. 261;
Singer Mfg. Co. v. McCollock, 24 Fed. 667;
Bigelow v. West. Wis. R. Co., 27 Wis. 478;
Palms v. Shawano County, 61 Wis. 211;
Johns v. Milwaukee, 88 Wis. 389.

The statement in the affidavit by the foreign corporation to be filed with the secretary of state containing a promise that the corporation will comply with the laws of the State of Wisconsin as to foreign corporations was held by the trial court to be a stipulation not to remove, and, therefore, necessarily void. It is our contention that this should be construed as requiring the corporation to do something which is legal and not to do something which is illegal or void. A construction that this is equivalent to stipulating that they will not remove a case to the federal court is a construction that the law requires it to do an illegal act. Such a construction is absurd.

We have already directed the court's attention to the fact that in the *Doyle Case* the law was upheld, although the stipulation which was declared unconstitutional in the *Morse Case* was a part of the same statute enacted by the legislature of Wisconsin. The part of the statute which requires the stipulation of the insurance companies, as passed upon in the *Morse Case*, is still a part of the insurance laws of the State of Wisconsin.

In subsec. 2, sec. 1915 it is provided:

> "Any such company or other insurer shall first file a written instrument, duly signed by the president and secretary thereof, with the corporate seal affixed, declaring that it desires to transact the business of insurance in this state and that it will accept a license therefor according to the laws of this state, *which shall cease and terminate in case such corporation shall remove into any court of the United States any action or proceeding commenced in any court of this state upon a claim or cause of action arising out of any business or transaction done therein, or in case it shall violate or fail to comply with any provision of law applicable to such corporation,* or in case its capital shall be impaired to the extent of twenty per cent. and shall not be made good within such time as the commissioner of insurance shall require, if such commissioner shall, in either case, declare its license revoked therefor." (Italics ours.)

It will be observed in that part of the subsection which is in italics two specific promises are made. One is that such corpora-

tion "shall cease and terminate" in case it "shall remove into any court of the United States any action or proceeding commenced in any court of this state upon a claim or cause of action arising out of any business or transaction done therein." The second is an agreement that it "shall cease and terminate" "in case it shall violate or fail to comply with any provision of law applicable to such corporation."

Evidently the lawmakers did not consider the first part of the stipulation as contained in the second, and it was necessary to expressly stipulate that it would not remove the case, in addition to the stipulation that it would not violate or fail to comply with the insurance laws. When, subsequently, the lawmakers enacted the statute concerning foreign corporations other than insurance corporations, they left out the stipulation that the corporation would not remove the case to the federal court and only required in the statement to be filed with the secretary of state's office a promise to comply with all the laws of the state with regard to foreign corporations.

In this connection we would call the court's attention to the provisions of subsec. 11, sec. 1770*b*, as follows:

> "The failure to comply with any of the provisions of this section shall, for such violation, subject the corporation or any agent, officer or person acting for it in this state, to a penalty of five hundred dollars, to be sued for and recovered in the name of the

state with the costs of prosecution, by the attorney-general or by the district attorney of any county in which it or any of its agents or officers shall be located, or reside, or transact or attempt to transact any business."

Here the word "comply" is also used in the first line and it must be given a consistent meaning in both cases.

Under this section a forfeiture could be recovered against a corporation only in case it violated any of the express requirements of the statute. No forfeiture could be recovered against the corporation for removing the case to the federal court. The corporation has the option to take its cases to the federal court and have its license revoked, or it may desist from taking its cases to the federal court and retain its license. The words, "failure to comply with any of the provisions of the section," must be given a strict construction against the state, and so the same words used in the same section requiring the statement to be filed with the secretary of state, containing a promise that the corporation "shall comply with all the laws of the state with regard to foreign corporations," must be construed in the same way. No stipulation not to remove a case was contemplated. This is the construction placed upon it by the administrative officers of the state.

Like words and expressions in the same section of the statutes should certainly be given the same meaning.

Sutherland, Stat. Const., 255;
28 Am. & Eng. Ency. of Law, (2d ed.) 610.

We, therefore, find proof within the statutes of the state that a promise to comply with all the laws concerning foreign corporations does not include within it a promise not to remove the case to the federal court. Had the lawmakers intended the provision here in question as a stipulation not to remove a case to the federal court, they certainly would have inserted such provision in this statute in the same way as it is found in sec. 1775 (subsec. 2). That they left it out shows that they did not intend to require such a stipulation. No such construction has ever been placed upon said statute by the administrative officers of the state; no statement filed in the office of the secretary of state contains a stipulation, in express terms, that a foreign insurance company will not remove a case to the federal court.

Even though this should be considered a stipulation, we contend that it should not be considered as invalidating other provisions of our foreign corporation laws. The provision for the cancelling of the license on removal of a case to the federal court by the foreign insurance company in the Wisconsin statute was upheld in the *Doyle Case* in spite of the fact that the same statute con-

tained a stipulation, which stipulation was declared void and of no effect in the *Morse Case*. So this statute in question, as to the cancellation of the license of a foreign corporation upon the removal of a case to the federal court, must be held as not being affected in any way by the statement filed in the secretary of state's office. If the statement is void, that does not make the other provision of the statute void. If the provision requiring the stipulation in the statute is inseparable from that part of the statute which requires the cancellation of the license upon the removal of a case to the federal court, as was held in the case of *Barron v. Burnside*, then the other provision of our foreign corporation laws authorizing the secretary of state to grant a license to a foreign corporation is also void. The words of Chief Justice Ryan in the case of *State ex rel. Drake v. Doyle*, 40 Wis. 198, speaking on a similar contention concerning the laws relating to foreign insurance companies, in which the stipulation had been declared unconstitutional in the *Morse Case*, and where it was contended that the whole law was also void, are here pertinent:

> "It is a settled doctrine of this court that, if it be unconstitutional, the whole statute authorizing licenses to foreign insurance companies is unconstitutional. *Slauson v. Racine*, 13 Wis. 398; *Lynch v. The Economy*, 27 Wis. 69; *State v. Dousman*, 28 Wis. 541. In that view of the statute no license to foreign insurance companies would be au-

thorized by law. The secretary of state would have acted without color of authority in issuing the license in question. The license would give no color of right to insurance companies to do business within the state."

We contend that the position that the law in question is unconstitutional is inconsistent with the position that the defendant is entitled to the benefits derived from the license. If this law is unconstitutional, then, under the construction placed upon similar statutes by the supreme court of the State of Wisconsin, the whole law is unconstitutional, including that part authorizing a license to be given to a foreign corporation.

We contend that the complainant in this case has no right to contend that the statute in question is unconstitutional, while at the same time retaining the benefits that it received by reason of a license having been issued it by virtue of said law.

Furguson v. Landrum, 5 Bush. (Ky.) 230, 196 Am. Dec. 350;
Daniels v. Tearney, 102 U. S. 421.

The scope and meaning of the law as interpreted by the higher court of the state should have great weight with this court in passing upon this question.

VII.

A Stipulation Required to be Filed in the Secretary of State's Office by a Foreign Corporation that it Will not Remove a Case to the Federal Court Does not in any Way Change the Effect of a Statute of this Nature.

In the dissenting opinion in the *Prewitt Case*, Justice Day, at page 268, used the following language:

> "Furthermore it is stated in the prevailing opinion that, while the state may exclude in advance or deprive a foreign corporation of the privilege of doing business after it is lawfully in the state because of the exercise of a federal right, it cannot require the corporation to agree in advance that it will waive such right, as that, it is admitted, would be unconstitutional. We think the distinction is without a substantial difference and makes the validity of the act turn upon the means of attaining the same unlawful end. In either alternative the corporation is excluded from the state because it will not consent to surrender the right given it under the federal constitution."

We agree with this to the extent that there is no substantial difference in the effect of the law as to whether a stipulation is or is not given to remove a case. The effect of the statute in either case is to induce the corpora-

tion to waive its right to remove a case to the federal court when it is doing an intrastate business within the borders of the state. We hope that this question will not turn upon as narrow a point as the giving of a stipulation. We contend that there was no intention by the lawmakers of the state to require a stipulation not to remove a case, and to hold that the provision here under consideration is, in effect, a stipulation not to remove a case; and then to hold that, because of that stipulation so required, the rest of the law is void and unconstitutional is, in our opinion, looking to the form instead of the substance of things. We hope that this court will pass upon the real merits of this question before it and will express itself in such clear language that the State of Wisconsin, as well as other states, may have definite knowledge as to whether a state may pass a law of this nature which has for its purpose and necessary effect the placing of a foreign corporation on substantially an equal basis with a domestic corporation.

VIII.

The Wisconsin Statutes Relating to Foreign ~~Insurance~~ Companies do not in any way Interfere with or Affect Interstate Commerce.

The scope and meaning of a state statute, as determined by the highest court of the state,

concludes this court in determining whether or not said statute violates the federal constitution.

Smiley v. Kansas, 196 U. S. 447;
Nat. Cotton Oil Co. v. Tex., 197 U. S. 115;
Tampa Waterworks Co. v. Tampa, 199 U. S. 241;
Horn Silver Mining Co. v. State of N. Y., 143 U. S. 305;
Ducat v. Chicago, 10 Wall. 410;
Paul v. Virginia, 8 Wall. 168.

This statute of Wisconsin relating to foreign corporations has been before the supreme court of the State of Wisconsin a number of times and was applied to a variety of conditions and its general validity sustained.

Ashland L. Co. v. Detroit S. Co., 114 Wis. 66;
Beaser v. Barber A. P. Co., 120 Wis. 599;
Chicago T. & T. Co. v. Bashford, 120 Wis. 281;
Greek-American S. Co. v. Richardson D. Co., 124 Wis. 469;
Pres. M. Fund v. Thomas, 126 Wis. 281;
Allen v. Milwaukee, 128 Wis. 678;
Chickering-Chase Bros. Co. v. White, 127 Wis. 83;
Catlin & Powell Co. v. Schuppert, 130 Wis. 642;
Elwell v. Adder Machine Co., 136 Wis. 82.

At page 88 of the last case Judge Timlin, speaking for the court, said:

"There must be read into the foregoing statutes, where they forbid the transaction of business in this state and the acquisition, holding, and disposal of property in this state, an exception of such business as constitutes interstate commerce and an exception of such property as is acquired, held or disposed of in this state in carrying on interstate commerce. Also, where every contract is declared to be void, we must except from that provision such contracts as relate to interstate commerce." Citing *Loverin & B. Co. v. Travis*, 135 Wis. 322, 115 N. W. 829; *Catlin & P. Co. v. Schuppert*, 130 Wis. 642, 110 N. W. 818; *Greek-Am. S. Co. v. Richardson D. Co.*, 124 Wis. 469, 102 N. W. 888.

The revocation of the license in question will therefore not interfere in any way with the right of the corporation to transact interstate commerce in the State of Wisconsin, for that right is not dependent upon a license from the state; neither is any corporation transacting business as the agent of the federal government required to have a license to do intrastate business in order to transact the business delegated to it by the federal government. The revocation of the license cannot in any way remove the right to transact such business and will therefore not deprive the corporation of doing business in the State of Wisconsin for which no license is required under the Wisconsin statutes.

IX.

The Revocation of the License of the Respondent Does not Deprive it of any Constitutional Rights.

The respondent has argued that a revocation of its license would deprive it of property without due process of law or would impair the obligation of contracts and property rights acquired in the state. This point, however, the trial court has not passed upon, and it is our contention that it is not well taken.

Under sec. 1, art. XI of the constitution of Wisconsin it is provided that all general laws or special acts enacted under the provisions of said section (relating to corporations) may be altered or repealed by the legislature at any time after their passage. Under this provision the supreme court has decided that all special acts of incorporation are subject to modification or repeal.

Pratt v. Brown, 3 Wis. 603;
Madison, etc. Plank Road Co. v. Reynolds, 3 Wis. 287;
Blair v. Milw. etc. Ry. Co., 20 Wis. 254;
State v. Milw. Gaslight Co., 29 Wis. 454.

In the case of *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, it was held that a power reserved to the legislature to alter, amend or repeal a charter authorized it to make any alteration or amendment of a charter granted

subject to that power, which would not defeat or substantially impair the object of the grant or any rights vested under it and which the legislature might deem necessary to secure either that object or any public right.

A corporation organized in this state that has acquired property has a vested interest in said property and when such corporation is dissolved by act of the legislature the property will go to the stockholders of the corporation and they may use and hold the property as any other person in the state.

In order to place foreign corporations doing a local business in the State of Wisconsin upon the same basis the legislature may at any time pass a law revoking the license of a foreign corporation or prescribing a condition under which a foreign corporation may continue to do business in the state. This is all that was provided by the statute in question.

It cannot be argued that, because a foreign corporation has acquired vested interests in the State of Wisconsin, the state is, for that reason, powerless to annul its license. The vested interests will not be interfered with under this statute.

Our supreme court has held, in the case of *Chicago Title & Trust Co .v. Bashford*, 120 Wis. 281, that the provision of section 1770*b* that a corporation while in default shall not "transact business or acquire, hold or dispose of property in this state" and that every contract made by it or in its behalf affecting its personal liability or relating to property within the

state shall be wholly void on its behalf, is to be construed as applying to prospective contracts and transactions only. At page 285 the court said:

> "We can feel no doubt that the legislation of 1897 was prospective only. That is the presumptive purpose in all enactments except some merely remedial statutes, unless the contrary clearly appears. *State v. Atwood*, 11 Wis. 422; *Seamans v. Carter*, 15 Wis. 584; *Finney v. Ackerman*, 21 Wis. 268; *Vanderpool v. L. C. & M. R. Co.*, 44 Wis. 652, 663; *Jochem v. Dutcher*, 104 Wis. 611, 614, 80 N. W. 949. Especially strong is that presumption in the present case, when the avoiding of an existing contract or the divesting of a vested right of property would be so clearly obnoxious to the constitutional prohibition against the impairment of the obligation of contracts (sec. 12, art. I, Const. Wis.; sec. 10, art. I, Const. U. S.), and against the deprivation of any person of property without due process of law (art. XIV, Amendment Const. U. S.)."

At page 286 the court further said:

> "So there remains of the acts prohibited by section 1770b only the holding of property in this state, if, indeed, the trustee holds property, instead of a mere lien thereon, having *situs*, not in Wisconsin, but at the domicile of the holder. *State ex rel. Dwinnell v. Gaylord*, 73 Wis. 316, 41 N. W. 521. From what has been said already, our conclusion must be obvious that the statute was not intended to apply to the acquisition of any property prior to its enactment, nor to the

holding of any so acquired, so long as the prohibition against transacting business in this state be not breached. That one, even a foreign corporation, owning property the day before the enactment of section 1770*b*, ceased to own or hold it upon the enactment of that statute, is a result which no legislature had any right to intend, nor have courts any right to impute such an intent. The absurdity of such a construction is emphasized by the accompanying prohibition against disposing of any such property. If the legislature intended to forbid the holding of previously acquired property, they equally forbade its disposal. Hence no foreign corporation owning property in this state when section 1770*b* took effect could escape criminality save upon the theory that the statute, *ex proprio vigore*, confiscated the property, so that its former owner had ceased to be such without having disposed of it. Clearly such confiscation would be obnoxious to the fourteenth amendment to the federal constitution, forbidding any state to deprive any person of property without due process of law. The only reasonable construction of this portion of the statute is that the prohibitions against holding or disposing of property must be taken as associated with that against acquiring any, so that they apply only to property attempted to be acquired after the statute, and therefore in its defiance. The question how far full enjoyment of previously acquired property so continued to be held by a foreign corporation may be affected by restraint on the doing of business or the making of contracts does not arise in the present case, since none of these prohibited acts appear to have been attempted

by plaintiffs. The consideration of that question may properly wait till it arises."

See also *Coe v. Rothman*, 126 Wis. 515.

It thus appears that the vested interests of foreign corporations are protected under the statute in question and the decisions of the supreme court of the State of Wisconsin. The revocation by the secretary of state of the license of the complainant in this case will not interfere with the vested interests of that corporation. So far as the property acquired and contracts made are necessary for the transaction of interstate business, they are not to be anticipated by a revocation of the license, because, under the decision of *Elwell v. Adder Machine Co.*, 136 Wis. 82, the act does not apply to interstate commerce. Neither will such vested rights be affected if the property was acquired and the contracts made in the transaction of local business prior to the revocation of the license, for the reason that such contracts are declared to be valid after the license has been revoked.

Should this court hold that the license of the complainant cannot be revoked and that the state is powerless to expel it from the state, so far as the transaction of future local business is concerned, then the complainant will have far greater powers in this state than it would have were it organized under the laws of the State of Wisconsin. The state would be powerless to revoke its privilege of doing busi-

ness within the state, while, if it were a domestic corporation, the corporate powers could be taken away at any time, under the reserve power vested in the legislature.

At this time we desire to call the attention of the court to the following provisions of sec. 1768:

> "The legislature may at any time limit or restrict the powers of any corporation organized under any law and for just cause annul the same and prescribe such mode as may be necessary for the settlement of its affairs."

If the power to revoke the license of a domestic corporation may be exercised in a case where a domestic corporation is engaged in interstate commerce, then how can it be said that a cancellation of the license of a foreign corporation to do intrastate business interferes with interstate commerce. In the former case, it would be more of an interference than in the latter. There is no question but that the state can revoke the license of a domestic corporation even though it is engaged in interstate commerce.

See *Louisville & Nashville Ry. Co. v. Kentucky*, 183 U. S. 503.

As the Wisconsin law is interpreted by the supreme court, and administered by the officers of the state, it is limited in its scope to intrastate business and it cannot be held void under the commerce clause of the federal constitution, unless this court is prepared to

go to the length of holding that a state altogether loses the right to exclude or regulate any foreign corporation whenever a part of its business is interstate commerce. The reserve right of the state to control the purely domestic business is as sacred and is to be as jealously guarded as the granted right of Congress to regulate its interstate business. It can with no more reason be held that the power of the state is lost because of the difficulty of severing the two kinds of commerce than it can be said that the power of Congress is lost for the same reason. The difficulty is one of administration and not of power.

> *Chicago R. R. Co. v. Cutts*, 94 U. S. 155; *Osborne v. Florida*, 164 U. S. 650.

We cannot agree that the necessary effect of enforcing the revocation of its license against a foreign corporation which has acquired property rights in the state and made contracts, is to deprive it of property without due process of law. In reply to a similar argument presented to the consideration of this court in *United States v. Delaware Railway Co.*, 213 U. S. 366, the court said:

> "In the form of statement these contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause interpreted as the Government construed it. For the purposes of our consideration of the

subject it may be considered as insisted in behalf of the United States that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation."

See also *Newport & Cincinnati Bridge Company v. United States*, 105 U. S. 470.

The position of counsel is that a corporation admitted into a state by its comity can transfer such comity into a perpetual right by the mere extent or nature of its investments. Constitutional limits upon the powers of the state do not have regard to the degrees of transgression. If a state cannot terminate the license of a foreign corporation to do business in the state for any declared and recognized grounds of forfeiture because the consequences to the corporation will be disastrous, then it is also true that it cannot forfeit the charter of any corporation whatever, since every forfeiture must be attained with similar loss. Certainly the powers of the state as to the right to exclude or control foreign corporations cannot be measured solely by the volume of the business and the nature and amount of the investments.

SUMMARY.

We have shown that:

It is the policy of the State of Wisconsin to treat foreign and domestic corporations equally. No discriminatory laws have been

enacted or enforced in the State of Wisconsin against foreign corporations, and the state has scrupulously endeavored to place foreign corporations on an equal footing with domestic corporations.

Section 1770*f* was enacted for the purpose of carrying out this policy, and it has the purpose and the effect of putting the two classes of corporations on an equal basis.

Without this law or one similar thereto, a foreign corporation would have greater powers in the state than a domestic corporation. It would be able to circumvent every statute enacted by the state for the protection of its citizens, concerning court procedure, by removing every case originating in the state, brought by a citizen of the state against such corporation, to the federal court. A foreign corporation would be in a position to prevent the citizens of the state exercising their remedial rights enacted by the state against corporations.

Experience has shown that foreign corporations have the power to harass the citizens of the state doing business with them by removing actions, brought against them for the purpose of enforcing remedial rights of the citizens, from courts created by the state to distant tribunals and thereby causing inconvenience and expense.

The provision of the Fourteenth Amendment to the constitution of the United States, that no state shall make or enforce any law which shall deny to any person within its

jurisdiction the equal protection of the law, is applicable to remedial rights. This amendment requires that all persons, including domestic and foreign corporations, shall have like access to the courts of the country for the protection of their persons and property, the redress of wrongs and the enforcements of contracts.

When a foreign corporation is within the state doing an intrastate business, it is a person within the contemplation of the Fourteenth Amendment and can not be placed in a separate class from domestic corporations, but all corporation laws of the state must be equally applicable to both.

The rule of comity goes only so far as to place foreign corporations on an equal basis with domestic corporations, but never beyond. This court has held that it does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation. The unanimous holding of the authorities is to that effect.

The rule of the *Doyle* and *Prewitt Cases*, properly qualified and limited in its scope, is applicable to this statute and is sufficient to sustain its constitutionality.

The condition attached to the license of the respondent to do intrastate bsuiness in the State of Wisconsin is constitutional for the reason that it is the only way in which foreign and domestic corporations can be placed upon an equality in the state, and is, therefore, authorized by the Fourteenth Amendment.

The right of a foreign insurance company to remove its cases to the federal court is just as sacredly guarded by the constitution and statutes of the United States as the right of any other corporation to do so, and the need of a law of this kind is as great in the case of a foreign corporation doing intrastate business and interstate business in this state as it is for a foreign insurance corporation.

A foreign corporation is not required by the statutes of Wisconsin, as a condition for receiving a license in the State of Wisconsin, to stipulate that it will not remove a case to the federal court.

The Wisconsin statutes relating to foreign corporations do not in any way interfere with or affect interstate commerce.

The revocation of the license of the respondent does not deprive it of any constitutional right.

Without this statute or one similar thereto, a foreign corporation would have greater powers in the state than a domestic corporation and this would induce corporations to organize in states where they do not intend to transact business, and thus greatly increase the number of "tramp" corporations.

* *

We therefore respectfully submit that the act of the legislature of the State of Wisconsin here under consideration is constitutional and a necessary enactment to prevent foreign

corporations from exercising greater powers in the State of Wisconsin than domestic corporations.

Respectfully submitted,

WALTER C. OWEN,
Attorney General,

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Assistant Attorney General,
Attorneys for Appellant.

APPENDIX

LAWS OF WISCONSIN RELATING TO FOREIGN CORPORATIONS

Section 1770b, as amended by Ch. 351, 1899; Ch. 399, 1901; Ch. 434, 1901; Ch. 506, 1905; Ch. 562, 1907; Ch. 142, Ch. 214, 1911; Chs. 212 and 248, 1913.

Corporation defined. Section 1770*b*. 1. For the purposes of this section, the term "corporation" shall include all corporations, associations, companies, joint stock companies, or express companies organized otherwise than under the laws of this state.

Articles; filing with secretary of state. 2. No corporation incorporated or organized otherwise than under the laws of this state, except railroad corporations, corporations, or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity upon the mutual or assessment plan, **shall transact business or acquire, hold or dispose of property in this state until such corporation shall have caused to be filed in the office of the secretary of state a copy of its charter, articles of association or incorporation and all amendments thereto duly certified by the secretary of state of the state wherein the corporation was organized.** In case the laws of the state wherein the corporation was organized do not require that the charter, articles of association or incorporation be filed in the office of the secretary of state, then said charter, articles of association or incorporation shall be certified to by the register of deeds or other officer with whom said articles of association or incorporation were filed with a certificate of the secretary

of state attached, certifying that said officer is the proper officer to certify to said articles of association or incorporation. Mortgages or trust deeds taken by foreign corporations after the twenty-sixth day of May, 1911, and prior to January 1, 1914, to secure the payment of money heretofore or hereafter loaned or advanced pursuant to such mortgages or deeds of trust, are hereby declared valid. But no trust deed given as security upon property in this state, if otherwise valid, shall be void merely because the trustee named therein shall be a foreign corporation which is not licensed to do business in this state.

Statement to be filed with articles; contents. 3. Such corporation, by its president, secretary, treasurer or general manager, shall make and forward to the secretary of state, with the articles of association or incorporation above provided for, a statement duly sworn to, stating:

a. The name of such corporation and the location of its principal office or place of business without this state, and, in case said corporation is to have any place of business or principal office within this state, the location thereof.

b. The names and addresses of the officers of said corporation, and the name and address of the agent or manager of said corporation who may represent said corporation in this state.

c. The amount of the capital stock paid in money, property or services.

d. The nature of the business to be transacted in this state.

e. The proportion of the capital stock of said corporation which is represented in this state by its property located or to be acquired therein and by its business to be transacted therein. In determining said proportion of the capital stock, the property of said corporation located in this state or to be acquired therein and the business transacted within and without the state for one year immediately preceding the filing of its charter or articles of association or incorporation shall be considered and control.

f. Shall constitute and appoint the secretary of state its true and lawful attorney upon whom the summons, notices, pleadings or process in any action or proceeding against it may be served in respect

to any liability arising out of any business, contract or transaction in this state, and stipulate that service thereof upon the secretary of state, or his assistant, shall be accepted irrevocably as a valid service upon it, and that such appointment and stipulation shall continue in force irrevocably so long as any liability of such corporation remains outstanding in this state.

g. When such corporation was authorized to do business in the state wherein incorporated and whether now so authorized.

h. That such corporation as a condition of its being permitted to begin or continue doing business within this state, shall comply with all the laws of the state with regard to foreign corporations.

Fee for filing. 4. Such corporation shall pay into the office of the secretary of state, upon filing its articles of association or incorporation, a fee of twenty-five dollars, and one dollar for every one thousand dollars of its capital stock exceeding twenty-five thousand dollars employed or to be employed in this state, as shown by its sworn statement.

Amendments; fee; penalty. 5. All amendments to the articles of association or incorporation made subsequent to the first filing with the secretary of state shall be certified to and filed in the same manner as the articles of association or incorporation, and shall be so filed within thirty days after the same have been filed with the secretary of state or other proper officer of the state wherein the corporation is organized. For filing such amendment the corporation shall pay to the secretary of state a fee of ten dollars except in case of amendment increasing capital stock, in which case the fee for filing shall be in addition to ten dollars, one dollar for each additional one thousand dollars of the increased capital stock to be used in this state, as shown by a sworn statement to be filed with the amendment increasing the capital stock, which said statement shall be signed by the president, secretary, treasurer or general manager of the corporation, and shall state the proportion of the increased capital stock to be employed in this state. In case of failure to file amendments, as above stated, the corporation shall pay to the secretary of state, on filing said amendment, a penalty of twenty-five dollars.

Officers; filing notice of change; license; revocation. 6. Whenever any change is made in the offices of such corporation, the names and addresses of the officers elected shall be filed with the secretary of state within twenty days after such change. The license of such corporation to do business in this state shall be revoked if it shall remove or make application to remove into any district or circuit court of the United States, any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within this state. (*1905 c. 506.*)

Annual report; contents; date of filing. 7. Every foreign corporation which has heretofore filed with the secretary of state a copy of its charter or articles of association or incorporation or which shall hereafter file the same as required by this act, and every foreign corportion transacting business in this state shall annually, between the first day of January and the first day of March, file with the secretary of state a report sworn to by the president, secretary, treasurer or general manager of the corporation, as of the first day of January, which shall state:

a. The name of such corporation and the location of its principal office or place of business without this state, and its place of business or principal office within this state, if maintained.

b. The names and addresses of the officers of said corporation, and the name and address of the agent or manager who may represent said corporation in this state.

c. The nature of the business transacted in this state during the year preceding.

d. The amount of capital stock paid in money, property or services.

e. The proportion of the capital stock represented in the state of Wisconsin by its property located and business transacted therein during the preceding year. In determining the proportion of capital stock employed in the state, the same shall be computed by taking the gross business in dollars of the corporation in the state and add the same to the full value in dollars of the property of the corporation located in the state. The sum so obtained shall be the numerator of a fraction of which the denominator shall consist of the total gross business in dollars of the corporation, both within and without the state,

added to the full value in dollars of the entire property of the corporation, both within and without the state. The fraction so obtained shall represent the proportion of the capital stock represented within the state. The secretary of state may demand, as a condition precedent to the filing of such report, such further figures, information and statements as he may deem proper in order to determine the accuracy of the reports submitted; the additional information so obtained shall not become a matter of record in the department of state. The corporation shall pay a fee of two dollars for filing such report. In case said report shows that said corporation employs in this state a proportion of its capital stock in excess of twenty-five thousand dollars, said corporation shall pay to the secretary of state, at the time of the filing of said report, an additional fee of one dollar for each one thousand dollars of such excess, except that the said corporation shall receive a credit for the proportion of its capital stock already paid for in excess of twenty-five thousand dollars.

f. That such corporation as a condition of its being permitted to begin or continue doing business within this state, shall comply with all the laws of the state with regard to foreign corporations. In case of failure to file said report in the time above stated, the corporation shall pay to the secretary of state a penalty of twenty-five dollars, if the same is filed before May first. In case said report is not filed by May first, or if said corporation shall remove or make application to remove into any district or circuit court of the United States any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within this state, the license issued to said corporation shall be void, and the secretary of state shall enter such forfeit in the records in his department. (*1907 c. 562.*)

Actions against; service upon. 8. Actions may be brought against any corporation in the name by which it is commonly known. All summons, notice, pleading or process, relating to foreign corporations which have been licensed under the provisions of this chapter, shall be served on the secretary of state in duplicate, one copy to be filed by him in his office, and the second copy to be forwarded by mail forthwith, postage prepaid,

and directed to such corporation at its principal place of business in the United States, as shown by the last sworn statement on file in his department, and at the time of serving said papers a fee of two dollars shall be paid to the secretary of state, which said fee shall be taxed as taxable costs in the action. (*1907 c. 562.*)

Articles; statements, when required. 9. In case any corporation shall not have any articles of incorporation, organization or association, it shall file in the office of the secretary of state the sworn statement above required of other corporations, and shall include in such statement a statement to the effect that such corporation has no articles of incorporation, organization or association. Such corporation shall file an annual report, as above required of other corporations, and shall pay the same fees and be subject to the same penalties as such corporations.

Contracts made before filing articles; liabilities; restrictions, powers. 10. All foreign corporations and the officers and agents thereof doing business in this state, shall be subjected to all the liabilities and restrictions that are, or may be imposed upon corporations of like character, organized under the laws of this state, and shall have no other or greater powers.

Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them.

Penalty. 11. The failure to comply with any of the provisions of this section shall, for such violation, subject the corporation or any agent, officer or person acting for it in this state, to a penalty of five hundred dollars, to be sued for and recovered in the name of the state with the costs of prosecution, by the attorney-general or by the district attorney of any county in which it or any of its agents or officers shall be located, or reside, or transact or attempt to transact any business; and such penalty, when recovered, shall be paid into the treasury of the

county for the benefit of the school fund. Such penalty shall not attach where a specific penalty is herein provided.

Subsections 3 and 4 when not to apply. 12. The provisions of subsections 3 and 4 relating to statements first to be filed and the fees first to be paid by a corporation of another state, shall not apply to any such corporation now actually doing business in this state under a license heretofore issued.

License; conditions imposed. Section 1770*c*. The secretary of state, shall, upon being satisfied that such foreign corporations, joint stock company, express company, has fully complied with the requirements of the preceding section, and all other provisions of law governing such corporations or associations, deliver to such corporation or association, as the case may be, a license to transact business in this state, which such license shall continue in force until revoked. And such license shall contain the conditions upon which such foreign corporation or association is permitted to do business in this state. (*1901 c. 399.*)

Foreign corporations not to transact business unless licensed. Section 1770*d*. No such foreign corporation or association, except such as have heretofore filed with the secretary of state copies of their articles of incorporation or association and have complied with the laws then in force, shall transact any business in this state without first having paid the license fee prescribed by section 1770*b* and obtained a license as provided in section 1770*c*. (*1901 c. 399.*)

Jurisdiction of circuit courts over. Section 1770*e*. The circuit courts shall have jurisdiction to give proper remedies to all persons injured or damnified or threatened with injury or damage, by any unlawful or illegal act of any such foreign corporation or association, or by any violation of any provision of law, and for the purpose of enforcing any of the penalties imposed upon such foreign corporations or associations by law. (*1901 c. 399.*)

Removal to Federal Court. Section 1770*f*. Whenever any foreign corporation doing business in this state shall remove or make application to remove into any district or circuit court of the United States any action or proceeding commenced against it by any citizen of this state, upon any claim or cause of action arising within this state, it shall be the duty of the secretary of state, upon such fact being made to appear to him, to revoke the license of such corporation to do business within this state. (*1905 c. 506.*)

Combinations; trusts. Section 1770*g*. Any foreign corporation which shall enter into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in the state, or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure by which its price to the public shall be in any manner controlled or established, shall, upon proof thereof, in any court of competent jurisdiction, have its license or authority to do business in this state cancelled and annulled. (*1905 c. 506.*)

Statement of non-violation. Section 1770*h*. No foreign corporation shall be authorized to file its charter or articles of incorporation or association with the secretary of state, or be authorized to do business in this state unless it shall at the time of making application therefor, file with the secretary of state an affidavit executed by its president, secretary or general managing officer stating that such corporation has not violated any of the provisions of section 1770*g*; and every such corporation shall upon filing its annual statement with the secretary of state, make and attach thereto the affidavit of its president, secretary or general managing officer, fully stating the facts in regard to the matters specified in section 1770*g*. (*1905 c. 506.*)

Ouster. Section 1770*i*. Upon complaint being made to the attorney-general and evidence produced to him which shall satisfy him that any such foreign

corporation has violated any of the conditions specified in sections 1770*f* and 1770*g*, he shall forthwith bring an action in the name of the state in any circuit court of this state, to have the license of such corporation to do business in this state, cancelled and annulled and upon due proof being made thereof to the satisfaction of the court, judgment shall be entered therefor. The provisions of section 1791*m* shall extend to all proceedings under this and the two foregoing sections. (*1907 c. 506.*)

Real property acquired before complying with Section 1770b. Section 1770*j*. 1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of section 1770*b* of the statutes, and which has thereafter, and before the passage of this section, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired, and the title so acquired, or attempted to be acquired, is hereby confirmed.

2. Any person claiming that the legal title of any corporation or of any person claiming by, through, or under such corporation, to any real property acquired, or attempted to be acquired, is invalid by reason of the failure of any corporation coming within the terms of subsection 1 of this section, to comply with section 1770*b* of the statutes, shall commence action to recover the property, or to declare the legal title of said corporation void, or interpose a defense on such grounds, within one year from the passage and publication of this section, and in case of failure to do so his right of action or defense, based upon the failure to comply with said section by any such corporation, shall be deemed to have expired; provided that this subsection shall not affect any action now pending.

Section 4096 (Ch. 231, 1911) relates to depositions of officers, agents and employees of corporations.

Section 4097 (Ch. 232, 1911) provides penalty for refusal or neglect of any officer, agent or employee to appear and testify.

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In the Supreme Court of the United States

OCTOBER TERM, 1915.

No. 254.

JAMES A. FREAR, in his capacity as Secretary of State of the State of Wisconsin,

Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

BRIEF FOR APPELLEE.

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SUBJECT INDEX.

PAGE

Statement 1

ARGUMENT.

I.

THE STATUTE IS UNCONSTITUTIONAL GENERALLY:

(1) Because it is a direct attempt to limit and restrict the judicial power of the United States;

(2) Because it requires a stipulation in advance not to exercise a Federal right;

(3) Because it discriminates between foreign corporations on the one hand and domestic corporations and individuals (resident or non-resident) on the other 2

(1)

Because it is an attempt to limit the judicial power of the United States..... 2

Present status of the Prewitt case as an authority 10

(2)

Because the statute requires a stipulation in advance not to exercise a Federal right.... 14

(3)

Because the statute discriminates against foreign corporations 19

II.

PAGE

The statute is unconstitutional at all events as to this appellee, because appellee is not within the class of foreign corporations which the State may arbitrarily exclude from the privileges of domestic business:

(1) Because it is an interstate telegraph company;

(2) Because it is a Federal postal agent..... 23

(1)

Appellee an interstate telegraph company.... 23

(2)

Appellee a Federal postal agent..... 26

CONCLUSION:

The temporary injunction order should be affirmed with costs..... 32

CASES CITED.

PAGE

Barron v. Burnside, 121 U. S. 186..... 14
Harrison v. St. Louis & San Francisco R. R. Co., 232 U. S. 318.....3, 4, 13, 25
Herndon v. Chicago, Rock Island & Pacific R. R. Co., 218 U. S. 135.....3, 22
Home Insurance Co. v. Morse, 20 Wall. 447.. 14
Kansas City Southern Ry. Co. v. Kaw Valley Drainage District, 233 U. S. 75..... 28
Ludwig v. Western Union Telegraph Co., 216 U. S. 146..... 11
Mercantile Trust Co. v. Texas & Pacific R. R. Co., 216 Fed Rep. 225..... 30
Mercantile Trust Co. v. Texas & Pacific R. R. Co., 223 U. S. 710..... 30
Missouri Pacific Railway Co. v. Larabee, 234 U. S. 459.....8, 11, 13
New York Life Insurance Co. v. Head, 234 U. S. 149.....6, 11, 13
Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1.....27, 29
Phoenix Insurance Co. v. McMasters, 237 U. S. 63 7
Pullman Company v. Kansas, 216 U. S. 56..11, 12
Security Mutual Life Insurance Co. v. Prewitt, 202 U. S. 246.....3, 11
Southern Pacific Co. v. Denton, 146 U. S. 202. 14
Southern Railway Co. v. Greene, 216 U. S. 400 .....11, 20
Western Union Telegraph Co. v. Kansas, 216 U. S. 1.....10, 11, 18, 23
Western Union Telegraph Co. v. Massachusetts, 125 U. S 530..... 27
Western Union Telegraph Co. v. Texas, 105 U. S. 460..... 27
Williams v. Talladega, 226 U. S. 404.....27, 28

In the Supreme Court of the United States

OCTOBER TERM, 1915.

No. 254.

JAMES A. FREAR, in his capacity as Secretary of the State of Wisconsin,

Appellant,

against

THE WESTERN UNION TELEGRAPH COMPANY,

Appellee.

Statement.

This appeal involves simply the question of the constitutionality, as to this appellee, of a statute of Wisconsin providing that if it should remove a case to the Federal court, where the cause of action arose within the State, appellee's license to do a domestic business should be revoked and it should be subjected to fines and penalties for continuing thereafter to carry on domestic business without the license.

The question has been so fully discussed and so thoroughly settled—and that so recently—by decisions of this court that counsel for appellee do not believe that the court will wish to hear argument on this side; and this brief will be confined to a short statement of four or five well settled principles of law, any one of which singly should sustain the injunction order appealed from.

It will be assumed that there is no question as to the jurisdiction of the court below, or as to the

propriety of the relief granted, in the form which that relief took, if the statute in question is unconstitutional. No question of that kind was raised below, nor is any raised by the Attorney General of Wisconsin in his brief here. The sole question therefore is whether the statute of Wisconsin, which is printed as an appendix to the Attorney General's brief, was in conflict with the Constitution and laws of the United States.

ARGUMENT.

I.

The statute is unconstitutional generally:

(1) Because it is a direct attempt to limit and restrict the judicial power of the United States;

(2) Because it requires a stipulation in advance not to exercise a Federal right;

(3) Because it discriminates between foreign corporations on the one hand and domestic corporations and individuals (resident or non-resident) on the other.

(1)

Because it is an attempt to limit the judicial power of the United States.

This court has always sought with peculiar zeal to safeguard the Federal rights, including the right of removal to the Federal court in a proper case, of foreign corporations, as well as of other persons. The problem has been how logically to safeguard those rights without denying or impair-

ing the complementary right of the State, with respect at least to foreign corporations not engaged in interstate commerce, to exercise the absolute power of exclusion if it sees fit, and a *fortiori* to impose unreasonable or offensive conditions on such corporations as the price of permitting them to enter or remain, on the principle that where the absolute power of exclusion exists its exercise cannot be forbidden because the State assigns for such exercise a poor reason or none.

The solution to this problem, foreshadowed by Mr. Justice DAY in his dissenting opinion in *Security Mutual Life Insurance Company* v. *Prewitt*, but not then persuasive with the majority of the court, seems to have been clearly developed in the later decisions, and finally placed beyond the realm of doubt or argument by *Herndon* v. *Chicago, Rock Island & Pacific Railway*, 218 U. S. 135, and *Harrison* v. *St. Louis & San Francisco Railroad*, 232 U. S. 318.

In the Herndon case, holding unconstitutional a statute of Missouri providing for the ouster of an interstate railway company from the privilege of domestic business provided it should bring an action in the Federal court or remove one thereto, Justice DAY said (p. 158):

> "In all the cases in this court, discussing the right of the States to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, it has been conceded that while the right to do local business within the State may not have been derived from the Federal constitution, the right to resort to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof.
>
> "It is enough now to say that within the principles decided at this term, in the cases

cited above, the act of March 13, 1907, as applied to the complainant railroad company, in view of the admitted facts set out in the bill in this case, is unconstitutional and void."

In Harrison against St. Louis & San Francisco Railroad, the CHIEF JUSTICE, writing for a unanimous court, holding unconstitutional an act of Oklahoma which it was conceded was intended to prevent the removal of causes from the State to a court of the United States, said (pp. 328, 329, 331-333):

"It may not be doubted that THE JUDICIAL POWER OF THE UNITED STATES as created by the Constitution and provided for by Congress pursuant to its constitutional authority, IS A POWER WHOLLY INDEPENDENT OF STATE ACTION and which therefore the several STATES MAY NOT BY ANY EXERTION OF AUTHORITY IN ANY FORM, DIRECTLY OR INDIRECTLY, DESTROY, ABRIDGE, LIMIT OR RENDER INEFFICACIOUS. * * * The right unrestrained and unpenalized by State action on compliance with the forms required by the law of the United States to ask the removal of a cause pending in a State to a United States court is obviously of the very essence of the right to remove conferred by the law of the United States. * * * Coming then to consider the statute from the second or latter point of view, we think it is clear that it plainly and obviously forbids a resort to the Federal courts on the ground of diversity of citizenship in the contingency contemplated, punishes by extraordinary penalties any assertion of a right to remove under the laws of the United States, and attempts to divest the Federal courts of their power to determine, if is-

sue arises on the subject, whether there is a right to remove. Indeed, the statute goes much further, since when an application to remove is made, in order to prevent a judicial consideration of its merits even by the State court, it in effect commands the judge of such court on the making of the application to refuse the same and to certify the fact that it was made to a State executive officer to the end that such officer should without judicial action strip the petitioning corporation of its right to do business, besides subjecting it to penalties of the most destructive character as a means of compelling acquiescence. When the nature of the statute is thus properly appreciated, nothing need be further said to manifest its obvious repugnancy to the Constitution or to demonstrate the correctness of the decree of the court below. * * * The proposition that the constitutionality of the statute and the action taken under it is supported by the decisions in *Doyle* v. *Continental Insurance Company*, 94 U. S. 535, and *Security Company* v. *Prewitt*, 202 U. S. 246, is we think plainly unfounded. Those cases involved State legislation as to a subject over which there was complete State authority, that is, the exclusion from the State of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a State of its right to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the State to exert its lawful power. But that the application of those cases to a situation where complete power in a State

> over the subject dealt with does not exist has since been so repeatedly passed upon as to cause the question not to be open. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, ib. 56; *Textbook Co.* v. *Pigg*, 217 U. S. 91; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205, and *Herndon* v. *C. R. & I. P. Ry.*, 218 U. S. 135. The grounds of the decision in the last case show the extremely narrow scope of the rulings in the Doyle and Prewitt cases, and render their inapplicability to this case certain. INDEED, THE RULING IN THE HERNDON CASE AND IN THOSE SUBSEQUENT TO THE DOYLE AND PREWITT CASES, MOST OF WHICH WERE REVIEWED IN THE HERNDON CASE, DEMONSTRATES THAT NO AUTHORITY IS AFFORDED BY THOSE TWO CASES FOR THE CONCEPTION THAT IT IS WITHIN THE POWER OF A STATE IN ANY FORM, DIRECTLY OR INDIRECTLY, TO DESTROY OR DEPRIVE OF A RIGHT CONFERRED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES."

In *New York Life Insurance Co.* v. *Head*, 234 U. S. 149, 164, the process of discrediting the Prewitt case, or what is left of it, continues:

> "It is true it has been held that in view of the power of a State over insurance, it might, as the condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the State, which otherwise but for the complete power to exclude would be held repugnant to the Constitution. In other words, that a company having otherwise no right whatever for any purpose to go in business without a license would not

> be heard after accepting the same to complain of exactions upon which the license was conditioned as unconstitutional because of its voluntary submission to the same. But even if it be put out of view that THIS DOCTRINE HAS BEEN EITHER EXPRESSLY OR BY NECESSARY IMPLICATION OVERRULED OR AT ALL EVENTS SO RESTRICTED AS TO DEPRIVE IT OF ALL APPLICATION TO THIS CASE (See *Harrison* v. *St. Louis & San Francisco Railroad Co.*, 232 U. S. 332, and authorities there cited), it here can have no possible application since such doctrine at best but recognized the power of a State under the circumstances stated to impose conditions upon the right to do the business embraced by the license and therefore gives no support to the contention here presented, which is that a State by a license may acquire the right to exert an authority beyond its borders, which it cannot exercise consistently with the Constitution."

In *Phoenix Insurance Co.* v. *McMaster*, 237 U. S. 63, 71, the court sustained a South Carolina statute excluding foreign insurance companies which had not made certain required investments or deposits within the State, but with the following carefully expressed limitation:

> "Furthermore, the Phoenix Company is a foreign corporation, whose license to do business in the State of South Carolina would expire upon the first day of April, 1912, and, therefore, it was within the power of the State, SO LONG AS IT DID NOT IMPOSE UPON THE COMPANY AS A CONDITION OF DOING BUSINESS WITHIN THE STATE ANY DEPRIVATION OF RIGHTS SECURED TO IT UNDER

> THE FEDERAL CONSTITUTION, to determine for itself the conditions upon which such foreign corporation could do business within the State. This principle has been often affirmed by the decisions of this court, and the insurance company, being within that class of companies not doing an interstate business, the State might, in the exercise of its lawful authority, exclude it from doing business within the State, SO LONG AS NO RIGHTS CONFERRED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES WERE DESTROYED OR ABRIDGED."

In *Missouri Pacific Railway Co.* v. *Larabee*, 234 U. S. 459, the court refused to sustain a statute of Kansas in so far as it authorized the allowance of attorneys' fees for services in this court for opposing an unsuccessful appeal thereto. Of this remarkable attempt by the State of Kansas to discourage resort to a Federal court—differing in principle from the Wisconsin statute only in that it was aimed at the highest Federal court instead of district courts of the United States—the CHIEF JUSTICE said (p. 471):

> "It would follow of course that the right to freely seek access to the Supreme Court of the United States would cease to exist, since it would be in the power of the States to burden that right to such a degree as to render its exercise impossible. How better could this be illustrated than by the case before us, that is, by the necessary implication that there would have been power in the court below if it had deemed it just to do so, to award the claim which was made for $75,000 attorneys' fees for services rendered in this court! Indeed, in the argument

> at bar it was freely conceded that it may well have been that the mainspring which caused the adoption of the statute relied upon was the deterrent influence which it would produce in the prosecution of writs of error to this court. * * * We shall reason no further, and shall content ourselves with pointing out that in substance and effect the absolute want of foundation for the contention here made has been in express terms foreclosed. For instance, at this term in *Harrison* v. *St. Louis & San Francisco R. R.*, 232 U. S. 318, a statute of the State of Oklahoma which burdened or impeded the right of free access to the courts of the United States was held to be repugnant to the Constitution and the destructive effect of such legislation upon our institutions was pointed out."

The point then is, as is apparent from these later decisions, that a State statute which directly attacks the jurisdiction of the United States courts is unconstitutional for that reason alone, without reference to its effect on the particular litigant whose recourse to those courts it is sought to curtail, or to the jurisdiction of the State over such litigant. It is unconstitutional not because of the contract clause, or the commerce clause, or the due process clause, but because it is an attack on, and to that extent in conflict with, the clause of the Constitution prescribing the extent of the judicial power of the United States, and the Acts of Congress passed in pursuance thereof. The difficulty of the majority of the court in the Prewitt case was that, as the State had the absolute power of exclusion and—*a fortiori*—the power to refuse to admit except upon unreasonable and offensive conditions, the foreign corporation in that case had no Federal right which IT could successfully assert

against the State. The embarrassment disappears and a clear way is pointed out to avoid State legislation of this vicious character if we approach the question, as is done in the Herndon and Harrison cases, from the point of view of the judiciary article of the Constitution and of the rights of the courts of the United States to exercise their allotted jurisdiction without interference from any State, rather than from the point of view of the right of the foreign corporation to insist, as against the State, that IT be admitted or allowed to continue business.

Present Status of the Prewitt Case as an Authority.

It may be that the Prewitt case is still law as far as corporations not engaged in interstate commerce are concerned. It may be that it is still law, even as to that class of corporations, only on the precise state of facts actually involved in the record in that case—namely, cases in which, at the time of the foreign corporation's application for admission to the State, the objectionable statute was in existence, so that the corporation came into the State with notice of the condition, offensive though it might be, for breach of which it would be thereafter expelled. It is certain that in the later cases the court has, with some pains and manifest inconvenience, avoided the explicit statement that the Prewitt case is absolutely overruled. Yet it does not seem that for practical purposes the Prewitt case can today be regarded as having any vitality as an authority.

In his dissenting opinion in *Western Union Telegraph Company* v. *Kansas*, in which the CHIEF JUSTICE and Justices MCKENNA and PECKHAM concurred, Justice HOLMES used the following signifi-

cant language with respect to the future of the Prewitt case and its doctrine:

> "I am aware that the battle has raged with varying fortunes over this matter of unconstitutional conditions, but it appears to me ground for REGRET THAT THE COURT SHOULD SO SOON ABANDON ITS LATEST DECISION, *Security Mutual Life Insurance Co.* v. *Prewitt*, 202 U. S. 246."

In the group of cases involving questions closely akin to that in the case at bar which were decided almost simultaneously in January, 1910, and reported in 216 U. S.—namely, *Western Union Telegraph Company* v. *Kansas, Pullman Company* v. *Kansas, Ludwig* v. *Western Union Telegraph Company*, and *Southern Railway Company* v. *Greene* —the alignment of the court was in each case the same—the then CHIEF JUSTICE, Mr. Justice McKENNA and Mr. Justice HOLMES dissenting; and the dissenting opinion in the Kansas case, it may be safely assumed, is to be regarded as expressing the views of the minority of the court in them all.

But there were no dissents in the Herndon or the Harrison cases (both of which are more directly inconsistent with the Prewitt case than was *Western Union Telegraph Company* v. *Kansas*), or in *New York Life Insurance Company* v. *Head*, or *Missouri Pacific Railway Company* v. *Larabee;* and the absence of any division can be explained, it would seem, only on the ground that the principles which the minority had deemed inconsistent with *Security Mutual Life Insurance Company* v. *Prewitt* had become so definitely established by the group of decisions in 216 U. S. that it had thereafter become the duty of the minority as well as of the majority in those cases to apply those decisions as law.

In his concurring opinion in *Pullman Company* v. *Kansas* the present CHIEF JUSTICE wrote (216 U. S. 74):

> "When first after the duty came to me of taking part in the work of the court the question arose of the right of a State in cases where it had absolute authority to impose an unconstitutional condition as a prerequisite to the right to do local business, my individual convictions were suppressed and my opinion yielded because of the conception that it was my duty to enforce in such a case the previous ruling of the court, however much as an original question I would have held a contrary view."

Similarly it seems that whatever original differences may have existed as to the doctrine of the Prewitt case, it has no longer any practical place in our constitutional law, unless possibly as applied to the single case of a corporation engaged in domestic commerce only, which is WARNED OF THE OFFENSIVE CONDITION BEFORE IT ENTERS THE STATE. And whether it can still be law even within such a limited field seems problematical, in view of the language of the CHIEF JUSTICE in the Harrison case, writing for a unanimous court:

> "Indeed, the ruling in the Herndon case and in those subsequent to the Doyle and Prewitt cases, most of which were reviewed in the Herndon case, demonstrates that no AUTHORITY IS AFFORDED BY THOSE TWO CASES FOR THE CONCEPTION THAT IT IS WITHIN THE POWER OF A STATE in any form, DIRECTLY OR INDIRECTLY, to destroy or DEPRIVE OF A RIGHT CONFERRED BY THE CONSTITUTION and laws of the United States"—

and of the further implication, in *New York Life*

Insurance Company v. *Head* (*supra*), that the Prewitt doctrine

> "has been either expressly or by necessary implication overruled or at all events so restricted as to deprive it of all application"

to that case—with a further reference to Harrison against St. Louis & San Francisco Railroad Company.

The Attorney General of Wisconsin refers lightly to the Harrison case and wisely makes no attempt to distinguish it or to explain the language quoted above. The opinions in *Missouri Pacific Railway* v. *Larabee* and *New York Life Insurance Company* v. *Head* have been handed down since the decision below, but he still more wisely makes no reference to them. The Herndon case he seeks to distinguish on the ground (see his brief, page 44) that the Missouri statute considered in the Herndon case prohibited the foreign corporation from bringing any suit in the Federal court as well as from removing cases to the Federal court from the State court, while the statute in the case at bar prohibits removal only, and that only in cases where the cause of action arose within the State. But of course this cannot be the basis of any sound distinction. You cannot deny the right of the State to interfere substantially with the jurisdiction of the Federal court and at the same time permit it to interfere a little bit. It was broadly announced in the Harrison case that the judicial power of the United States is "wholly independent of State action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, ABRIDGE, LIMIT or render inefficacious." An attempt to abridge or to limit is as vicious as an attempt to destroy. If this were not so, it might as well be argued that a statute would be consti-

tutional which forbade removals to the Federal courts only on Mondays, Wednesdays and Fridays and permitted them on the other days of the week; or we might even have the spectacle of a State which cannot forbid removals to the Federal court generally prescribing an open and close season for such removals, as in the case of game.

We conclude therefore that even if the Western Union Telegraph Company had no better rights than an insurance company, the Wisconsin act in question ought, in line with the modern trend of thought as evidenced by the latest decisions of the court, to be treated as invalid; especially as the act was not in existence when the company entered the State.

(2)

Because the statute requires a stipulation in advance not to exercise a Federal right.

This was the somewhat narrow ground of the decision below. While narrow it seems, as far as this particular record is concerned, to be unanswerable.

It is conceded by everybody, the Attorney General included, that even the Prewitt case does not authorize the State to require, as a condition of admitting a foreign corporation to the State or permitting it to remain therein, that the foreign corporation shall AGREE IN ADVANCE not to remove cases to the Federal court.

Home Ins. Co. v. *Morse,* 20 Wall. 447.
Barron v. *Burnside,* 121 U. S. 186.
Southern Pacific Co. v. *Denton,* 146 U. S. 202.

The court below said (Record, pp. 22, 23):

> "The statute provides that the foreign corporation, as a condition of doing business in the State, or continuing it, shall state in its application to come in, and its annual sworn reports, that it will comply with all the laws of the State relative to foreign corporations.
>
> "One of these laws provides that if the corporation shall avail itself of the right of removal it shall lose its local license. The question is whether the company, thus compelled to state that it will comply with the local law, is in substance compelled to contract, as a condition of its admission or continued presence in the State, that it will not exercise its constitutional right of removal, but consent to litigate certain cases only in the State court. * * * The question is whether section 1770F is substantially a command or prohibition to refrain from taking a removal. It is evident that such a stipulation in the ordinary private contract would not be a prohibition, but merely a condition. But contracts such as those here in question are not between citizens or subjects, but between a political superior and a subject—between the State as a local sovereignty and a citizen or subject of another State. The object of such statutes is public policy. The corporation cannot elect whether it will stay out, being practically coerced to come in by threatened loss of contract and property rights. The parties are by no means on equal terms. One is a sovereign, dictating what the subject, in these cases lawfully in the State for some purposes, shall do if it remains therein for other

purposes closely related. So when the State enacts that if the subject does something it has a perfect abstract right to do it shall be punished, it is thereby substantially prohibited. The Federal penal code of 1909 (35 Stat. 1089, Comp. Stats. 1911, Sup. 1590) contains very few express commands. Most of its sections provide that whoever shall do certain acts shall be punished. This is the same as enacting that these are unlawful and prohibited. No one would contend that these were not commands to refrain from those acts. They are prohibitions from a political superior to a subject, enacted for the public welfare. The State says to the telegraph company or coal company, 'You are in the State lawfully for interstate and government business. If, however, you do any other kind of business you must have a local license. If you remove to a Federal court any case, whether in your interstate or local business, brought against you by a citizen of Wisconsin on a cause of action arising therein, your license to do a local business will be revoked. Any contract not in interstate commerce you may thereafter make will be void in your favor but valid against you, and any conveyance of land for local purposes which you may take will not vest any title.' This is a substantial command or prohibition. It is the same as saying, 'You shall not remove such a case.'

"In the Morse case (20 Wall. 445) there was an express stipulation not to remove actions against the company. But in the Burnside case (121 U. S. 186) the prohibition was implied, as it is here. The application of the foreign corporation to be

> permitted to do business in Iowa was required to contain a stipulation 'that said permit shall be subject to each of the provisions' of the foreign corporation statute. A removal to a Federal court by the corporation was made a forfeiture of the permit. No application had ever been made by the company to be permitted to do business in the State, and one of its servants was arrested for running an interstate train in Iowa. The court said: 'The locomotive engineer is arrested for acting as such in the employment of the corporation because it has refused to stipulate that it will not remove into the Federal court suits brought against it in the State court, as a condition of obtaining a permit, and consequently has not obtained such permit. * * * As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States the statute requiring the permit has been held to be void.' This decision has been many times approved by the Supreme Court and Circuit Courts of Appeals. The citing cases are discussed by Mr. Justice DAY in the dissenting opinion in the Prewitt case *supra*.
>
> "Being unable to distinguish these cases from the Burnside decision, the duty to grant the application for a preliminary injunction is plain."

The Attorney General of Wisconsin seeks to escape from the force of this reasoning by insisting that it was not contrary to the law of Wisconsin for the appellee to remove a case to the Federal court (Brief, p. 55.):

> "It thus appears that the foreign corporation may comply with this law when it removes the case as well as when it does not remove the case. It is given the option to remove it or to refrain from removing it. If it removes the case it is still within its rights under the statute and is complying with the law."

But it is idle to say that one is complying with the law in performing an act for the performance of which he may be subjected, by law, to severe and burdensome, not to say murderous, penalties. That the deprivation of the right to do a local business in the case of such a corporation as the appellee is a severe penalty cannot be disputed on theory, and has been the subject of express decision in many of the later cases. As the present CHIEF JUSTICE said in the Kansas case (216 U. S. p. 50):

> "This cause is concerned, not with the power of the State to prevent a corporation from coming in for the purpose of doing local business and to attach conditions to the privilege of so coming in, but involves the right of the State TO CONFISCATE THE PROPERTY OF THE CORPORATION already within the State and which has been there for years. * * * The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired, that is, for both interstate and local business. THE STATE LAW TAKES THE PROPERTY, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden. * * * If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of do-

> ing the local business becomes worthless AND IS IN EFFECT CONFISCATED. If, on the other hand, the unconstitutional burden be borne, A LIKE RESULT TAKES PLACE."

It is idle to say that an act is permitted by law and is not a violation of law simply because the letter of the statute, instead of in terms prohibiting the performance of the act, simply provides that in case any one does the act his property shall be confiscated. That is the language used to define crime in many penal codes besides the Federal penal code referred to by the court below.

(3)

Because the statute discriminates against foreign corporations.

The statute absolutely forbids removal of a case to the Federal court where the cause of action arose within the State. It does not provide that such suits shall not be removed on the ground of diversity of citizenship merely; it provides that they shall not be removed at all. A domestic corporation or an individual of course can remove a case to the Federal court in the first instance, even though the cause of action arose within the State, if a question arising under the Constitution and laws of the United States is involved and if the amount in controversy exceeds three thousand dollars, without being subjected to any penalty. This obvious discrimination, of itself, is sufficient to invalidate the statute. The legislature of Wisconsin can no more deprive a foreign corporation which has acquired permanent property and is conducting a permanent business within the State, with the State's previous permission and sanction, of the right to avail itself of certain methods of de-

fense which are available in similar cases to domestic corporations and individuals, than it can levy on such a foreign corporation a discriminatory tax.

In *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 413, in denying the right of the State to collect a tax from a foreign corporation not imposed on domestic corporations of the same class, the court said:

> "It is sufficient for the present purpose to say that we are not dealing with a corporation seeking admission to the State of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that State; nor with one which has come into the State upon conditions which it has since violated. In the case at bar we have a corporation which has come into and is doing business within the State of Alabama, with the permission of the State and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which the foreign corporation has acquired under the permission and sanction of the laws of the State. This feature of the case was dealt with by Mr. Justice BREWER, then a Circuit Judge, in the case of *Ames* v. *Union Pacific R. R. Co.*, 64 Fed. Rep. 165, 177, wherein he said:
>
> "'It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transporta-

tion, can be taken elsewhere and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value.' * * *

"We have here a foreign corporation within a State, in compliance with the laws of the State, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business. * * * It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the State and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the State, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protec-

> tion of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution."

In the Herndon case (*supra*), identical in this respect with the case at bar, the court said (p. 158):

> "Moreover, this is not a case where the State has undertaken to prevent the coming of the corporation into its borders for the purpose of carrrying on business. The corporation was within the State, complying with its laws, and had acquired, under the sanction of the State, a large amount of property within its borders, and thus had become a person within the State within the meaning of the Constitution, and entitled to its protection. Under the statute in controversy A DOMESTIC RAILROAD COMPANY might bring an action in the Federal court, OR IN A PROPER CASE REMOVE ONE THERETO, without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the act. * * * It is enough now to say that within the principles decided at this term, in the cases cited above, the Act of March 13, 1907, as applied to the complainant railroad company, in view of the admitted facts set out in the bill in this case, is unconstitutional and void."

II.

The statute is unconstitutional at all events as to this appellee, because appellee is not within the class of foreign corporations which the State may arbitrarily exclude from the privileges of domestic business:

(1) Because it is an interstate telegraph company;

(2) Because it is a Federal postal agent.

The threatened exclusion of the appellee is confessedly arbitrary. It is not pretended that the appellee has been guilty of any *improper* act which would justify its exclusion: it is even insisted by the Attorney General, as heretofore pointed out, that the appellee has neither broken nor threatened to break any law, constitutional or otherwise, of the State. He says in his brief, we repeat (p. 55):

> "If it removes the case it is still within its rights under the statute and is complying with the law. If it does not remove the case it is also complying with the law."

It is settled that with respect to the arbitrary power of exclusion from the privilege of domestic business all corporations are divided into two classes: those with respect to which the arbitrary power exists, and those with respect to which it does not exist.

(1)

Appellee an interstate telegraph company.

In *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, Justice HARLAN said (pp. 33, 37, 45, 46):

> "But it is said to be well settled that a

State, in the exercise of its reserved powers, may prescribe the terms on which a foreign corporation, whatever the nature of its business, may enter and do business within its limits.

"It is true that in many cases the *general* rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But THOSE WERE CASES IN WHICH THE PARTICULAR FOREIGN CORPORATION before the court WAS ENGAGED IN ORDINARY BUSINESS AND NOT DIRECTLY OR REGULARLY IN INTERSTATE OR FOREIGN COMMERCE. * * * We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. * * * THE VITAL DIFFERENCE BETWEEN THE PREWITT CASE AND THE ONE NOW BEFORE US is THAT THE BUSINESS OF THE INSURANCE COMPANY, involved in the former case, WAS NOT, as this court has often adjudged, INTERSTATE COMMERCE, WHILE THE BUSINESS OF THE TELEGRAPH COMPANY WAS PRIMARILY

AND MAINLY THAT OF INTERSTATE COMMERCE. A decision, such as was rendered in the Prewitt case, that a State could, with or without reason and without violating the Constitution, revoke its permit to a foreign insurance company to do business of a domestic character within its limits, cannot be cited as authority for the proposition, upon which the Kansas statute rests, that a State may prescribe such regulations as to corporations of other States engaged in both interstate and local business"—etc.

In *Harrison* v. *St. Louis & San Francisco Railroad* (232 U. S. 318, 332), the CHIEF JUSTICE said:

"The proposition that the constitutionality of the statute, and the action taken under it, is supported by the decisions in *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, and *Security Co.* v. *Prewitt*, 202 U. S. 246, is we think plainly unfounded. Those cases involved State legislation as to a subject over which there was complete State authority, that is the exclusion from the State of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a State of its right to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the State to exert its lawful power. But that THE APPLICATION OF THOSE CASES TO A SITUATION WHERE COMPLETE POWER IN A STATE, OVER THE SUBJECT DEALT WITH, DOES NOT EXIST, has since been so repeatedly passed upon as to cause the question not to be open. *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman*

Co. v. *Kansas*, ib. 56; *Textbook Co.* v. *Pigg*, 217 U. S. 91; *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205, and *Herndon* v. *C., R. & I. P. Ry.*, 218 U. S. 135."

There is then no authority at all at the present time for the proposition that an interstate telegraph company, having been invited within the State and allowed with the sanction of the State to accumulate property and build up a permanent business therein, may be ARBITRARILY ousted from the privilege of domestic business; and on the contrary it is thoroughly settled that such an arbitrary ouster is a violation of the commerce clause, as well as of the contract and due process clauses, of the Federal Constitution.

(2)

Appellee a Federal postal agent.

In the peculiar case of this appellee, there is an additional reason why it cannot be ousted from domestic business in the State. The bill alleges (Record, pp. 2, 3), and the demurrer admits, that on June 8, 1867, appellee filed with the Postmaster General of the United States its written acceptance of the Act of Congress approved June 24, 1866, 14 Stat. 221, c. 230 (Rev. Stat. §§ 5263-5268), and has at all times since then fully performed all obligations and requirements of said act, and as a part of the postal equipment of the United States and as an instrumentality of the postal department of the United States carried upon its lines of telegraph messages for the government of the United States, for the several departments thereof, and for the people of the State of Wisconsin, as prescribed and required in and by the provisions of said act.

Even as to purely domestic traffic therefore it is not within the power of the State of Wisconsin to

prohibit the operation of the appellee's lines; and—especially as there is no exception of governmental business in the act under consideration—it must necessarily be void as applied to this appellee.

Pensacola Tel. Co. v. *W. U.*, 96 U. S. 1.
W. U. Tel. Co. v. *Texas*, 105 U. S. 460.
W. U. Tel. Co. v. *Massachusetts*, 125 U. S. 530.
Williams v. *Talladega*, 226 U. S. 404.

In *Telegraph Company* v. *Texas* (*supra*, 105 U. S. 460, 464), it was said:

> "The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a Government agent for the transmission of messages on public business."

In *Western Union Telegraph Company* v. *Massachusetts* (*supra*, 125 U. S. 530, 554), it was distinctly stated that in the case of a telegraph company which has accepted the Act of July 24, 1866, the State could not interfere by any specific statute to prevent it "from placing its lines along these post roads, OR STOP THE USE OF THEM AFTER THEY WERE PLACED THERE"; that

> "If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done."

This principle was reaffirmed, and the case of *Western Union* v. *Massachusetts* expressly recognized as a binding authority in support of it, as

recently as in the case of *Kansas City Southern Railway Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, 78:

> "HOLMES, J. The freedom from interference on the part of the States is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ. It was held that under the permissive statute authorizing telegraph companies to maintain lines on the post roads of the United States a State could not stop the operation of the lines by an injunction for failure to pay taxes. *Western Union Telegraph Co.* v. *Attorney General of Massachusetts*, 125 U. S. 530. *Williams* v. *Talladega*, 226 U. S. 404, 415, 416."

In *Williams* v. *Talladega* (*supra*), the peculiar standing of this appellee as a governmental agency was again recognized, and an ordinance imposing a license tax on domestic business, without excepting business for the Federal government, was held invalid (226 U. S. 404, 419):

> "Were it otherwise, an agency of the Federal government, in the execution of its sovereign power, would be at the mercy of the taxing power of the State. It is enough in this connection to refer to the cases of *McCulloch* v. *Maryland*, *supra*; *Osborn* v. *Bank*, 9 Wheat. 738; *Railroad Co.* v. *Peniston*, 18 Wall. 5; *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1; *Central Pacific R. R. Co.* v. *California*, 162 U. S. 91.
>
> "We have, then, an ordinance which taxes, without exemption, the privilege of carrying on a business a part of which is that of a governmental agency constituted under a law of the United States and engaged in an

essential part of the public business—communication between the officers and departments of the Federal government. The ordinance, making no exception of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license exacted necessarily affects the whole and makes the tax unconstitutional and void."

In *Pensacola Tel. Co.* v. *Western Union* (*supra*, 96 U. S. 1, 8), it was said:

"Congress has power * * * to establish post offices and post roads * * * Post offices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national Government. The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the

> general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by State legislation. * * * It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its usefulness."

In *Mercantile Trust Co.* v. *Texas and Pacific Railway Co.*, 216 Fed. Rep. 225 (affirmed 223 U. S. 710 on the authority of the Herndon case, *supra*), the question was as to the validity of a constitutional provision of Louisiana attempting to bar from the State the Texas and Pacific Railway Company, a Federal corporation, in case it should remove a suit to the Federal court. The following is from the opinion in the court below (p. 230):

> "Congress has, therefore, adopted the defendant company as an agency or instrumentality, in carrying out the powers vested in Congress. * * * The services which Congress proposes to obtain, by means of the railroad, cannot be economically and efficiently obtained unless the railroad is vested with power, not only to perform the peculiar services required by the Government, but also to engage in the general business of a common carrier. Congress has, therefore, made use, not merely of the railroad, but of the railroad as a common carrier, in all the branches of the business of a common carrier, for its own purposes. * * *

> "It is clear that when Congress has the power, under the Federal Constitution, to adopt and use, for the convenience of the operations of the Federal Government, a corporation of any kind as its agency, in such case a State legislature cannot, in any manner, interfere with the operations of such agency so employed by Congress for Federal Governmental purposes. The States cannot deny to these Federal corporations the right to enter the States, or do business in the States. Neither can they announce conditions for noncompliance with which the Federal corporations will be excluded from the States. And it is inconceivable that the States could exclude from their borders the Federal corporations used as Government agencies when those corporations decline to surrender their right to litigate in the Federal Courts.
>
> "I am clear, therefore, that the constitutional amendment is invalid and without effect as to the Texas & Pacific Railway Company."

If the Texas & Pacific Railway Company is a governmental agent, so also and for kindred reasons is the appellee. Its purely domestic operations within the State, if authorized by Congress under the post roads clause, cannot be prohibited by the State, regardless of any question of interstate commerce or vested rights. Certainly, as to appellee, a State act of this character would in any event be void for making no distinction between domestic business generally and business done in pursuance of its obligation to act as a direct agency for the Federal government.

CONCLUSION.

The temporary injunction order should be affirmed with costs.

Respectfully submitted,

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DONALD, SECRETARY OF STATE OF WISCONSIN, *v.* PHILADELPHIA & READING COAL & IRON COMPANY.

FREAR, AS SECRETARY OF STATE OF WISCONSIN, *v.* WESTERN UNION TELEGRAPH COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

Nos. 253, 254. Argued April 13, 1916.—Decided May 22, 1916.

The judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and which, therefore, the several States may not, by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious. *Harrison* v. *St. Louis & San Fran. R. R.*, 232 U. S. 318.

A State may not prevent foreign commercial corporations doing local business from exercising their constitutional right to remove suits into Federal courts.

Section 1770 f, added June 20, 1905, to the Statutes of Wisconsin of 1898, providing for the revocation of the licenses of any foreign corporation to do business within the State in case it removes, or makes application to remove, any action commenced against it by a citizen of that State into a Federal court is unconstitutional as beyond the power of the State.

219 Fed. Rep. 199, affirmed.

THE facts, which involve the validity under the Federal Constitution of a statute of Wisconsin providing for revocation of licenses granted to corporations not organized under the laws of that State in case they remove into the Federal courts actions commenced against them by citizens of the State on causes of action arising in the State, are stated in the opinion.

Mr. J. E. Messerschmidt, with whom *Mr. Walter C. Owen*, Attorney General of the State of Wisconsin, was on the brief, for appellants in both cases:

The act is in accord with the policy of the State of Wisconsin concerning corporations and to hear domestic and foreign corporations alike.

The provision of the statute, that, if a foreign corporation shall remove or make application to remove into any District or Circuit Court of the United States any action or proceeding commenced against it by any citizen of Wisconsin upon any claim or cause of action arising within this State, the license issued to said corporation shall be void and the Secretary of State shall enter such forfeit in the records in his department, has not for its object to oust the Federal court of jurisdiction, but the primary purpose is the putting of foreign corporations on substantially the same footing as domestic corporations and such is the result.

The mandate of the Fourteenth Amendment that no State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws, is applicable to remedial rights.

The rule of comity goes only so far as to place foreign corporations on an equal basis with domestic corporations, but never beyond.

The rule of the *Doyle* and *Prewitt Cases*, properly qualified and limited in its scope, is applicable to this statute and is sufficient to sustain its constitutionality.

A foreign corporation is not required by the statutes of Wisconsin, as a condition for receiving a license in the State of Wisconsin, to stipulate that it will not remove a case to the Federal court.

A stipulation required to be filed in the Secretary of State's office by a foreign corporation that it will not remove a case to the Federal court does not in any way change the effect of a statute of this nature.

The Wisconsin statutes relating to foreign companies do not in any way interfere with or affect interstate commerce.

The revocation of the license of the respondent does not deprive it of any constitutional rights.

Mr. M. H. Boutelle for appellee in Number 253.

Mr. Rush Taggart, with whom *Mr. Francis Raymond Stark* was on the brief, for appellee in Number 254.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

These appeals bring up for consideration the validity of a Wisconsin statute providing for revocation of licenses granted to corporations not organized under the laws of that State. They were heard together and to dispose of them by one opinion will be convenient.

Terms and conditions upon which foreign corporations might do local business and penalties for failure to comply therewith were first prescribed by the legislature of Wisconsin in 1898. Amendatory and supplemental statutes were enacted and finally the act of June 20, 1905, added four new sections to the statutes of 1898, one of which follows:

SEC. 1770*f*. "Whenever any foreign corporation doing business in this state shall remove or make application to remove into any district or circuit court of the United States any action or proceeding commenced against it by any citizen of this state, upon any claim or cause of action arising within this state, it shall be the duty of the secretary of state, upon such fact being made to appear to him, to revoke the license of such corporation to do business within this state."

Since 1860 the Western Union Telegraph Company, a

New York corporation, has been continuously carrying on within Wisconsin both intra- and interstate commerce and for use therein has acquired and owns a large amount of property. In 1907 it filed with the secretary of state a copy of its charter, paid the prescribed fee and took out a license to do intrastate business.

The Philadelphia & Reading Coal & Iron Company, a Pennsylvania corporation, since prior to 1898, within Wisconsin has been continuously shipping and selling coal both in intrastate and interstate commerce, and for use therein has purchased at great expense docks and other properties. Having paid required fees and filed its charter with the secretary of state, it received a license, November 10, 1898.

The Western Union Telegraph Company removed to the United States District Court a civil suit begun against it in the Circuit Court, Dane County, Wisconsin, during 1911; and in 1912 an action against the Philadelphia & Reading Coal & Iron Company was likewise removed. Averring that so far as the same directs or attempts to direct annulment of its right to do business § 1770*f*, above quoted, is in conflict with the Federal Constitution, each of the appellees filed an original bill praying an injunction restraining the secretary of state from revoking its license because of such removal. The lower court sustained the claim of unconstitutionality (216 Fed. Rep. 199), granted preliminary injunctions and these direct appeals were taken.

Consideration of the Wisconsin statutes convinces us that they seek to prevent appellees and other foreign commercial corporations doing local business from exercising their constitutional right to remove suits into Federal courts. To accomplish this is beyond the State's power. The action of the court below in holding § 1770*f* inoperative and enjoining its enforcement as to appellees was correct and its decree must be affirmed.

We are asked in effect to reconsider the question discussed and definitely determined in *Harrison* v. *St. L. & San Francisco R. R.*, 232 U. S. 318. We there said (p. 328): "The judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious."

Affirmed.